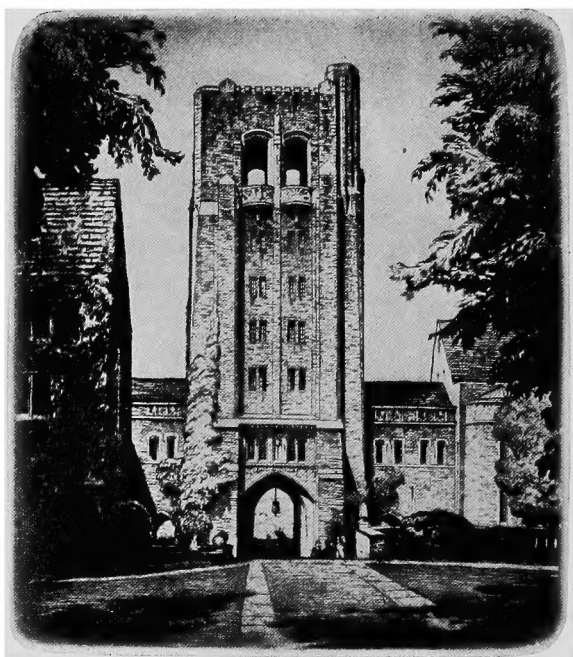


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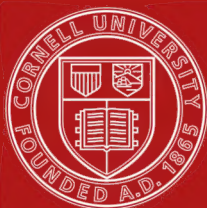
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A
TREATISE
ON
BILLS OF EXCHANGE
AND
PROMISSORY NOTES.

A

TREATISE

OF THE LAW OF

BILLS OF EXCHANGE,

PROMISSORY NOTES,

BANK-NOTES, BANKERS' CASH-NOTES AND CHECKS.

BY

JOHN BARNARD BYLES,

SERJEANT-AT-LAW,

WITH A PATENT OF PRECEDENCE.

Fourth American,

FROM THE SIXTH LONDON EDITION.

WITH ADDITIONAL NOTES,

ILLUSTRATING THE LAW AND PRACTICE IN THIS COUNTRY,

By HON. GEORGE SHARSWOOD.

VIGILANTIBUS NON DORMIENTIBUS JURA SUBVENIUNT.

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TO THE
RIGHT HON. SIR JAMES PARKE,
ONE OF THE
BARONS OF HER MAJESTY'S COURT OF EXCHEQUER,
TO WHOM
THE LAW AND ITS PROFESSORS ARE UNDER OBLIGATIONS AS
GREAT AS TO ANY JUDGE WITHIN LEGAL MEMORY,

This Work,
IS,
WITH HIS PERMISSION,
RESPECTFULLY INSCRIBED,
BY
THE AUTHOR.

.

NOTE TO THE
FOURTH AMERICAN EDITION.

THIS Treatise is now presented to the American Profession, in a separate, and it is hoped, much improved form. Much care has been bestowed upon the Editorial Department. The cases on the subject are so numerous in the American Courts, that the difficulty has been to avoid encumbering the work with crowded references. The Editor's effort has been to select and arrange the more important decisions, illustrative of the principles of the text, avoiding,—except in a few instances, in which it seemed important, for the sake of the Student,—any discussion of the grounds of the cases. In this respect, the character of the notes has been made, as far as the ability of the Editor permitted, to conform to that of the text, which is remarkable for its succinctness and for its judicious selection of leading points and cases. It is evident that an attempt to do more—to make a library of the book—would have destroyed its symmetry and usefulness. Byles on Bills has now established its reputation as a standard work, and it may safely be commended, as well for its accuracy as its compendiousness, to the American Student and Practitioner.

G. S.

APRIL, 1856.

P R E F A C E

TO THE FIRST EDITION.

THERE is no vestige of the existence of bills of exchange among the ancients, and the precise period of their introduction is somewhat controverted.* It is, however, certain that they were in use in the

* Il n'y a aucun vestige de notre contrat de change, ni des lettres de change, dans le droit Romain. Ce n'est qu'il n'arrivât quelquefois chez les Romains, que l'on comptât pour quelqu'un une somme d'argent dans un lieu à une personne, qui se chargeoit de lui en faire compter autant dans un autre lieu. Ainsi nous voyons, dans les lettres de Cicéron à Atticus, que Cicéron, voulant envoyer son fils faire ses études à Athènes, s'informe si pour épargner à son fils de porter lui-même à Athènes l'argent dont il y auroit besoin, on ne trouveroit pas quelque occasion de le compter à Rome à quelqu'un qui se chargeroit de le lui faire compter à Athènes.—*Epist. ad Att. XII, 24, XV, 25.* Mais cela n'étoit pas la négociation de lettres de change telle qu'elle a lieu parmi nous ; cela se faisoit par de simples mandats. Cicéron chargeoit quelqu'un de ses amis de Rome, qui avoit de l'argent à recevoir à Athènes, de fair tenir de l'argent à son fils à Athènes ; et cet ami, pour exécuter le mandat de Cicéron, écrivoit à quelqu'un des débiteurs qu'il avoit à Athènes, et le chargeoit de compter une somme d'argent au fils de Cicéron. Au reste, on ne voit point qu'il se pratiquât chez les Romains, comme parmi nous, un commerce de lettres de change : et nous trouvons au contraire, en la loi 4, § 1, ff. de naut. Foen., qui est de Papinian, que ceux qui prêtoient de l'argent à la grosse aventure aux marchands, qui trafiquoient sur mer, envoyoient un de leurs esclaves pour recevoir de leur débiteur la somme prêtée lorsqu'il seroit arrivé au port où il devoit vendre ses marchandises ; ce qui certainement n'auroit pas été nécessaire, si le commerce des lettres de change eût été en usage chez les Romains.

Quelques auteurs ont prétendu que l'usage, du contrat de change et des lettres de change est venu de la Lombardie, et que les Juifs, qui y étoient établis, en ont été les inventeurs : d'autres en attribuent l'invention aux Florentins, lorsqu'ayant

fourteenth century. Indeed, they are mentioned as 'letteres d'es-change' in the English Statute Book (3 Ric. 2, c. 3), as early as the year 1379. Though we find in our English reports no decision relating to them earlier than the reign of James the First.*

It is probable, that a bill of exchange was, in its original, nothing more than a letter of credit from a merchant in one country, to his debtor, a merchant, in another, requesting him to pay the debt to a third person, who carried the letter, and happening to be travelling to the place where the debtor resided. It was discovered by experience, that this mode of payment was extremely convenient to all parties;—to the creditor, for he could thus receive his debt without trouble, risk, or expense to the debtor, for the facility of payment was an equal accommodation to him, and perhaps drew after it a facility of credit—to the bearer of the letter, who found himself in funds in a foreign country, without the danger and incumbrance of carrying specie. At first, perhaps, the letter contained many other things beside the order to give credit. But it was found that the original bearer might often, with advantage, transfer it to another. The letter was then disencumbered of all other matter, it was open and not sealed, and the paper on which it was written, gradually shrunk to the slip now in use. The assignee was, perhaps, desirous to know beforehand, whether the party to whom it was addressed, would pay it, and sometimes showed it to him for that purpose; his promise to pay was the origin of acceptances. These letters or bills, the representatives of debts due in a foreign country, were sometimes more, sometimes less, in demand; they became, by degrees, articles of traffic; and the present complicated and abstruse practice and theory of exchange was gradually formed.

Upon their introduction into our own country, other conveniences, as great as in international transactions, were found to attend them. They offered an easy and most effectual method of eluding the stubborn rule of the common law, that a debt is not assignable; furnish-

été chassés de leur pays par la faction de Gibelins, ils s'établirent à Lyon et en d'autres villes. Il n'y a rien sur cela de certain, si ce n'est que les lettres de change étoient en usage des le quatorzième siècle. C'est ce qui paroît par une loi de Venise de ce temps sur cette matière rapportée par Nicholas de Passeribus, en son livre De Script. Privat. lib. 3.—Pothier Traité du Contrat de Change, Partie Prem.; Chap. 1, s. 1.

* Martin v. Bourne, Cro. Jac. 6.

ing the assignee with an assignment binding on the original creditor, capable of being ratified by the debtor, perhaps guaranteed by a series of responsible sureties, and assignable still further, *ad infinitum*. Not only did these simple instruments transfer value from place to place, at home or abroad, and balance the accounts of distant cities without the transmission of money; not only did they assign debts in the most convenient, extensive, and effectual manner; but the value of a debt was improved by being authenticated in a bill of exchange, for it was thus reduced to a certain amount, which the debtor, having accepted, could not afterwards unsettle; evidence of the original demand was rendered unnecessary, and the bill afforded a plainer and more indisputable title to the whole debt. A creditor, too, by assigning to a man of property a bill at a long date, given him by his debtor, could obtain for a trifling discount, his money in advance. Credit to the buyer was thus rendered consistent with ready money to the seller, and the reconciliation of the apparent inconsistency was brought about by a further benefit to a third person, for it was effected by advantageously employing the surplus and idle funds of the capitalist. At the first introduction of bills of exchange, however, the English Courts of Law regarded them with a jealous and evil eye, allowing them only between merchants; but their obvious advantages soon compelled the judges to sanction their use by all persons; and of late years the policy of the Bench has been industriously to remove every impediment, and add all possible facilities to these wheels of the vast commercial system.

The advantages of a bill of exchange, in reducing a debt to a certainty, curtailing the evidence necessary to enforce payment, and affording the means of procuring ready money by discount, often induced creditors to draw a bill for the sake of acceptance; though there might be no intention of transferring the debt. Such a transaction pointed out the way to a shorter mode of effecting the same purpose by means of a promissory note. Promissory notes soon circulated like bills of exchange, and became as common as bills themselves. Notes for small sums, payable to bearer on demand, were found to answer most purposes of the ordinary circulating medium, and have at length, in all civilized countries, supplanted a great portion of the gold and silver previously in circulation. Great, however, as was the saving, and numerous the advantages arising from the substitution, it was discovered by experience that the dangers and

inconveniences of an unlimited issue of paper money were at least as great. The legislature, have, therefore, found it necessary to place the issue of negotiable notes for small sums under the restrictions, which will be pointed out in this work; and experience has proved that the only mode of preserving paper money on a level with gold, is to compel the utterers to change it for gold, at the option of the holder. And peradventure even then, unless the State control the issue of paper, on principles imperfectly understood at present, the value of the whole circulating medium may decline together,* as compared with other commodities or the currency of foreign countries, and the consequent tendency of the precious metals to leave the kingdom may, by narrowing the basis of the currency, endanger the whole superstructure.

During the suspension of cash payments and the circulation of one pound notes, nearly every payment, in this country, was made in paper. And some idea may be formed of the immense amount of property even now afloat in bills and notes, when it is considered that all payments for our immense exports and imports, almost every remittance to and from every quarter of the world, nearly every payment of large amount between distant places in the kingdom, and a large proportion of payments in the same place, are made through the intervention of bills; not to mention the amount of common promissory notes, at long and short dates, and the notes of the Bank of England and country banks. It will not, perhaps, be an unreasonable inference that the bills and notes of all kinds, issued and circulated in the United Kingdom in the space of a single year, amount to many hundred millions,† and that this species of property

* This consequence does not appear to have been foreseen by the late Mr. Ricardo.

† This deduction is fully supported by the returns of the Stamp Office. The net produce of the stamps on bills of exchange and promissory notes in Great Britain alone, for the year ending on the 5th January, 1828, was 578,654*l.* 4*s.* 5*d.* Now, supposing that the gross amount received for stamps amounted to 600,000*l.*, an estimate, in all probability, considerably below the truth, and that the stamp is, upon an average, 4*s.* per cent. on the value of the instrument (for, though it is more on small, it is less on large sums), the value of the bills and notes stamped in a single year will be *three hundred millions*. The amount circulated must be considerably more, for in this calculation are not included any bills drawn abroad or in Ireland, and a further allowance is to be made for instruments of more than twelve months' date, and for all reissuable notes. I presume the above return includes the composition in lieu of stamp duties paid by the Governor and Company of the Bank of England. The weekly average amount of Bank of England notes and bank post-bills in circulation for the year preceding April 6, 1828, was 21,549,318*l.* 10*s.*

is now, in aggregate value, inferior only to the land or funded debt of the kingdom.

Simple as the form of a bill or note may appear, the rights and liabilities of the different parties to those instruments have given rise to an infinity of legal questions, and multitudes of decisions. A striking proof of what the experience of all ages had already made abundantly manifest,—that law is, in its own nature, necessarily voluminous; that its complexity and bulk constitute the price that must be paid for the reign of certainty, order, and uniformity; and that any attempt to regulate multiform combinations of circumstances, by a few general rules, however skilfully constructed, must be abortive.

In France, this subject has been briefly but most luminously treated by M. Pothier, a learned civilian of the last century, whose work, as well as his other performances, and in particular the *Traité des Obligations*, evinces a profound acquaintance with the principles of jurisprudence, and extraordinary acumen and sagacity in their application; the result of the laborious exercise of his talents on the Roman law. There cannot be a greater proof of the surpassing merit of his works, than that, after the lapse of more than half a century, and a stupendous revolution in all the institutions of his country, many parts of his writings have been incorporated, word for word, in the new Code of France. The *Traité du Contrat de Change* is often cited in the English Courts of Law. “The authority of Pothier,” says the present learned Chief Justice* of the Common Pleas, “is as high as can be had, next to the decision of a Court of Justice in this country; his writings are considered by Sir William Jones as equal, in point of luminous method, apposite examples, and a clear manly style, to the works of Lyttleton on the Laws of England.”†

In this country, the growth of the law on bills and notes has been almost proportionate to the increase of those instruments; insomuch that within the last sixty years the reported decisions upon them, in law, equity, and bankruptcy, would fill many volumes. Numerous have been the attempts to reduce the mass of authorities to the shape of a regular treatise; but amongst all these, two only are now in

* Lord Chief Justice Best.

† Cox v. Troy, 5 B. & Ald. 481; E. C. L. R. Vol. 7. There is now also an able modern French work on the same subject by M. Noguier. In America have recently appeared the Commentaries of Mr. Justice Story, on the Law of Bills of Exchange, and his Commentaries on the Law of Promissory Notes.

common use in the Profession, the treatise of Mr. Chitty, and the summary of Mr. Justice Bayley.*

The work of the learned Judge is considered authority, and is written with the greatest circumspection; but it is now out of print, and the latest edition some years old.

Mr. Chitty's treatise is a laborious and full collection of almost all the cases, by an eminent counsel, the extent of whose legal acquirements, and the readiness of their application, can only be appreciated by those who have been in the habit of personal intercourse with him. But the size of the book is an objection with many, and a cloud of authorities will sometimes obscure the most luminous arrangement.

This little work does not aspire to compete with either of the above learned performances, but merely to supply a want felt by many, of a plain and brief summary of the principal practical points relating to bills and notes, supported by a reference to the leading or latest authorities. In many cases the reader will, however, find the law laid down in the very words of the judgment, a plan which the Author has been induced to adopt, partly that those who may not have ready access to the authorities may be satisfied that the law is correctly stated; and partly because he distrusted his own ability to enunciate, on so complicated a subject, a general rule, neither too narrow nor too wide, beset, as almost all such general rules now are, with numerous qualifications and exceptions. No pains have been spared to render the subject intelligible. How far the book is likely to be useful in practice, it is for others to determine.

JOHN BARNARD BYLES.

INNER TEMPLE,

16th April, 1829.

* Mr. Roscoe's Digest, and Mr. Johnson's book had not appeared when these observations were written.

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BILLS OF EXCHANGE.

CHAPTER I.

GENERAL OBSERVATIONS ON A BILL OF EXCHANGE.

EXPLANATION OF TERMS,	1	HOW FAR BILLS AND NOTES ARE CON-	
PECULIAR QUALITIES OF CONTRACTS		SIDERED AS CHATTELS,	3
ON BILLS OR NOTES,	2	MAY BE TAKEN IN EXECUTION,	3
EFFECT OF DRAWING OR INDORSING A		WHERE A BILL OR NOTE MAY OPERATE	
BILL,	2	AS A WILL OR TESTAMENTARY IN-	
		STRUMENT,	3

A BILL of Exchange is a written order(*a*) from A. to B. directing B. to pay C. a sum of money therein named.(1)

(*a*) It is said that it was formerly essential to the validity of a bill of exchange, that it should be drawn in one place and payable in another: no such requisite now exists by the English law, although it is in general otherwise, according to the definitions in the codes prevailing on the continent of Europe; see the note of Mr. Serjeant Manning to *Miller v. Thompson*, 4 M. & G. 260; E. C. L. R. vol. 43.

(1) This definition is remarkable for its conciseness and accuracy. Yet, perhaps, it does not sufficiently express the quality of absoluteness, or that the money shall be paid absolutely and at all events. The learned author uses the word "direct" instead of the word "request," which is the more usual. The former word implies a command, and that the drawer has a right to require the payment. The case of *Little v. Slackford* (1 Moody and Malkin, 171; 22 Eng. Com. Law, 280), is supposed to support the position that a bill of exchange must purport to be a demand made by a party having a right to call on the other to pay. That was a case, however, in which the paper was offered under a count for money paid, and was objected to for want of a stamp. In *Ruff v. Webb*, 1 Esp. Rep. 129, the paper was: "Mr. Nelson will much oblige Mr. Webb, by paying J. Ruff or order twenty guineas on his account." Lord Kenyon held it to be a bill of exchange. Judge Story has remarked that language of mere civility cannot, of itself, change the nature of the instrument; and in order to displace the construction, that the instrument is a bill, it would seem to require, that the language necessarily imported to ask a favor and

A. is called the drawer, B. the drawee, and C. the payee.

Sometimes A. the drawer is himself the payee.

And usually the bill is made payable, not to the payee alone, but also to his order or to the bearer.

When B., the drawee, has undertaken to pay the bill, he is called the acceptor.

If the bill is made payable to C., or *bearer*, C. may transfer the bill to D. by merely delivering it into his hands, and then D. stands

not to be words of civility. Story on Bills, § 33, note. It must be admitted that this is attempting a very refined distinction, and frequently of very difficult application in the construction of such instruments. It is well settled that it is not necessary to constitute a bill of exchange that the drawer should have funds in the hands of the drawee: *Luff v. Pope*, 5 Hill, 413; *S. C.* 7 Hill, 577; and even where he has, it is not in all cases that he has a right to draw. To give such right there must be an agreement to accept, or a usage of trade, or course of dealing between the parties equivalent thereto. Where the draft is for a part only of the debt due the drawer, the creditor has no right to divide his cause of action without the consent of the debtor. Where the whole of a particular fund or debt by name is drawn for, so as to give the payee or holder a right to sue the drawer without acceptance in the name of the drawee, this is an assignment in equity, but not a bill of exchange. *Harrison v. Williamson*, 2 Edw. Rep. 430; *Quin v. Hanford*, 1 Hill, 82; *Mandeville v. Welch*, 5 Wheaton, 286.

It seems therefore that Bayley's definition, which has been adopted by Chancellor Kent, is preferable to that in the text. "A bill of exchange is a written order or request by one person to another for the payment of money *absolutely and at all events*." Judge Story objects to this, as well as other definitions, on the ground that it does not include the idea of negotiability, which, he thinks, although not by our law essential to the instrument, yet undoubtedly is that peculiar distinguishable quality, which, practically speaking, among merchants constitutes its true character. Story on Bills, § 2, 3, 4. He accordingly expresses a preference for Mr. Kyd's definition, Kyd on Bills, p. 3. "An open letter of request, addressed by one person to a second, desiring him to pay a sum of money to a third or any other to whom that third person shall order it to be paid; or it may be payable to bearer." It is to be observed, however, that this definition expresses merely the idea of assignability, not of negotiability, which is that peculiar commercial quality by which not only the instrument is assignable at law, but the assignee for value *bona fide* and without notice cannot be affected by any equities, as between the original or prior parties. It has been expressly held that a bill not payable to order or bearer is still a bill of exchange. *Wills v. Brigham*, 6 Cushing, 6. And as to promissory notes, the point is well settled that though not made payable to order or bearer, yet if the payer puts his name upon it and transfers it he is liable as an indorser (p. *62), and the instrument may be declared on as a promissory note. It would be inaccurate therefore to include the idea even of assignability. It is evident that all the qualities of an instrument need not enter into the definition, but only such as distinguish it on its face from other instruments.

in the same situation with regard to B. the acceptor, as C. the original payee did.

If the bill be payable to C., *or order*, then C. cannot transfer, except by a written order, usually on the back of the bill, called an indorsement, after which C. is called the indorser, and D., to whom it may be so transferred, the indorsee.(1)

(1) It is worthy of note that the author by *transfer* in this passage means a transfer to pass a legal title to the holder so as to enable him to sue in his own name. There may be an assignment in equity for a valuable consideration of a bill or not, just as there may be of any other chose in action. *Jones v. Witter*, 13 Mass. 304; *Dunn v. Snell*, 15 Ibid. 485; *Titcomb v. Thomas*, 5 Greenleaf, 282. A deed of assignment of bills of exchange and negotiable notes does not pass the legal but only the equitable title to them. *Grand Gulf Bank v. Wood*, 12 Smedes and Marshall, 482.

The rule of the common law forbade the assignment of choses in action as tending to maintenance. The Court of Chancery, however, at an early day took cognizance of such assignments, and gave effect to them by treating the assignor as a trustee for the assignee. They held that payment to the original creditor after notice of the assignment did not discharge the debtor, though the assignee took the chose in action subject to all the equities which attached to it in the hands of the assignor at the time of the assignment. 2 Vern. 428, 540, 595, 692.

In courts of law the interest of the equitable assignee soon came to be recognized. Still however it always was, and unless when modified by express statute still is necessary that the suit should be carried on in the name of the assignor. Subject to this technical rule in regard to the form of the action, the equitable assignee is regarded as the real owner, his rights protected and his remedies preserved, even against the acts and deeds of the legal plaintiff on the record. Thus the bankruptcy of the assignor was decided to be no impediment to an action in his name where the debt had been assigned before the bankruptcy. *Winch v. Keeley*, 1 T. R. 619; *Carpenter v. Morrell*, 3 Bos. & Pul. 40. So in other respects. See the learned opinion of Buller J. in *Master v. Miller*, 4 T. R. 340.

The American Courts have followed in the track of these decisions with even still greater liberality. In *Welch v. Mandeville*, 1 Wheat. 233, it was determined that a nominal plaintiff, suing for the benefit of his assignee, cannot, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action. Judge Story said: "Courts of law following in this respect the rules of equity, now take notice of assignments of choses in action, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law."

Thus payment or release, after notice of the assignment, is no defence. *Littlefield v. Story*, 3 Johns. 426; *Raymond v. Squier*, 11 Johns. 47; *Dix v. Cobb*, 4 Mass. 511; *Wheeler v. Wheeler*, 9 Cowen, 34; *Eastman v. Wright*, 6 Pick. 316; *Laughlin v. Fairbanks*, 8 Missouri, 367; *Parker v. Kelley*, 10 Smedes and Marshall, 184; the *State v. Jennings*, 5 English, 428.

The nominal plaintiff will not be allowed to discontinue the action. *McCullum v. Coxe*, 1 Dall. 139.

Nor can the debtor set off any demands against the assignor which accrued after notice of the assignment. *Goodwin v. Cunningham*, 12 Mas. 193; *Jenkins v. Brewster*, 14 Ibid. 291; *Sampson v. Fletcher*, 1 Vermont, 168; *Cummings v. Fullum*, 13 Vermont, 434; *Bartlett v. Pearson*, 29 Maine, 9.

An assignment of a particular claim passes to the assignee all securities and remedies which the assignor had to secure and recover it, though they are not specifically mentioned in the assignment. *Miller v. Ord.* 2 Binn. 382; *Mehaffy v. Share*, 2 Penna. Rep. 361; *Waller v. Tate*, 4 B. Monroe, 529; *Farmers' and Drovers' Bank v. Fordyce*, 1 Penna. State Rep. 445; *Fox v. Foster*, 4 Ib. 119; *Cathcart's Appeal*, 13 Ibid. 182. When the assignor is insolvent and a suit is pending in his name for the assignee's benefit, the court will allow the defendant, after verdict, to suggest on the docket for whose use the suit is brought, and will rule the assignee to pay the costs. *Canby v. Ridgway*, 1 Binn. 496. The person for whose use an action has been brought, is liable in assumpsit, upon an express promise to pay the defendant in such action the amount of costs incurred. *Brewer v. Hays*, 2 Watts, 12.

The death of the assignor does not defeat the assignment, but the assignee may use the name of the executor or administrator of the assignor, to recover the money. *Dawes v. Boylston*, 9 Mass. 337; *Cutts v. Perkins*, 12 Mass. 206; *Grover v. Grover*, 24 Pick. 261.

But the law has not been so held elsewhere. It is sufficient if notice is given to the debtor in time to enable him to protect himself by taking defence against the attachment. *Dix v. Cobb*, 4 Mass. 512; *Stevens v. Stevens*, 1 Ashmead, 190; *Stockton v. Hall, Harden*, 160; *Nesmith v. Drum*, 8 Watts & Serg. 9; *Littlefield v. Smith*, 5 Shepl. 327. *see note 2 next page*

But although notice is necessary, in order to make it available against payment

session *of the bill, and entitled, at law, to receive its contents [*2]
from another.(b)

By the common law of England, no contract or debt is assignable, our ancestors appearing in the times of simplicity, to have apprehended from such transfer much oppression and litigation. But mercantile experience has proved the assignment of debts to be indispensable, and bills of exchange to be the most convenient instruments for facilitating, securing, and authenticating the transfer. They have,

(b) This latter branch of the definition is essential. For if a man find or steal a bill, though his mere possession will give him a title to retain the instrument as against strangers, yet he cannot sue on the bill, for under a traverse of the indorsement or delivery to himself, which he must allege in his declaration, the circumstances attending his acquisition of the bill may be shown. *Marston v. Allen*, 8 M. & W. 494.*

or other discharge of the debtor,² it has been held not necessary to render it valid as to third parties. A draft upon a particular fund, in the hands of an attorney, for collection, is an equitable assignment of it, and, although not accepted by the attorney, yet it is not afterwards subject to be attached for the debt of the drawer. *Nesmith v. Drum*, 8 Watts & Serg. 9.

However, since it is not in the power of a creditor to split his cause of action, without the debtor's consent, an order or draft for a part only of the debt due from the drawee to the drawer, does not, against the consent of the drawee, amount to an assignment of such part. *Gibson v. Cook*, 20 Pick. 15.

"An equitable assignment is an agreement in the nature of a declaration of trust which a chancellor, though deaf to the prayer of a volunteer, never hesitates to execute when it has been made on valuable or even good consideration." *Nesmith v. Drum*, 8 Watts & Serg. 10. But see *Kennedy v. Ware*, 1 Penna. State Rep. 445, in which it is held that such an assignment, in consideration of natural love and affection, is void. See *Anon.* 2 Hayw. 352; *Ellis v. Amason*, 2 Dev. Ch. 273; *Braham v. Ragland*, 3 Stewart, 247; *Blin v. Pierce*, 20 Vermont, 25; *Langley v. Berry*, 14 New Hamp. 82; *Brown v. Foster*, 4 Cushing, 214. In a valuable note to the case of *Welch v. Mandeville*, 1 Wheat. 236, the learned reporter shows that, though the civil law considers choses in action, as strictly speaking, not assignable; yet by the invention of a fiction, the Roman jurisconsults contrived to attain this object. The creditor who wished to transfer his right of action to another person, constituted him his attorney or *procurator in rem suam*, as it was called; and it was stipulated that the action should be brought in the name of the assignor, but for the benefit and at the expense of the assignee. *Pothier de Vente*, No. 550. After notice to the debtor, this assignment operated a complete cession of the debt, and invalidated a payment to any other person than the assignee, or a release from any other person than him. *Ib.* 110, 554; *Cod. Napoleon*, liv. 3, tit. 6; *De la Vente*, c. 8, s. 1690.

therefore, come into universal use among all civilized nations, and the common law has recognized them as part of the *law merchant*.^(c)

The common law again distinguishes contracts into two kinds: contracts under seal or by deed; and contracts not under seal or simple contracts. Contracts under seal are valid without consideration; simple contracts are void unless consideration be averred in pleading and established in evidence.

All the contracts arising on a bill of exchange are simple contracts, but they differ from other simple contracts in these two particulars: first, that they are assignable;^(d) secondly, that consideration will be presumed till the contrary appear.⁽¹⁾

(c) Usages which are part of the law merchant need not be pleaded. Such are the assignable qualities of bills of exchange and bills of lading. Such also the general lien of bankers on the securities of their customers. "When," says Lord Campbell, "a general usage has been judicially ascertained and recognized, it becomes part of the law merchant, which courts of justice are bound to know and recognize." *Brandao v. Barnett*, 3 C. B. Rep. 530, E. C. L. R. vol. 54; Dom. Proc.; *Barnett v. Brandao*, 6 M. & G. 665, E. C. L. R. vol. 46.

(d) In one sense a bill of lading is assignable, that is to say, its indorsement assigns the property, but it does not transfer the contract. *Thompson v. Dominy*, 14 M. & W. 403.*

(1) Bills and notes, unlike other parol contracts, are prima facie evidence of valuable consideration, not only as between the original parties, but as against third persons. In all cases where the bill can be used as evidence, either against the parties or against third persons, the same legal presumption arises of its having been given for value received as exists in relation to a deed expressed to be given for a valuable consideration. A bill of exchange, therefore, although according to the general principles of the common law it is to be considered in the light of a simple contract, is nevertheless in this respect entitled to the privilege of a speciality, which carrying with it internal evidence of a valuable consideration, supersedes the necessity of averring and proving one. This privilege always belonged to foreign bills, and has at length, though not without some struggles as it is said, been conceded to inland or domestic bills, and promissory notes. *Mandeville v. Welch*, 5 Wheaton, 577; *Murry v. Clayburn*, 2 Bibb, 300; *Lines v. Smith*, 4 Florida, 47. Value is implied in every acceptance or indorsement of a bill or note, and the burden of proof is on the other party, to rebut this presumption. *Clark v. Schneider*, 17 Missouri, 295. The principle is confined, however, to paper strictly negotiable, and does not apply to notes or bills which do not fall within that category. Thus an accepted order payable in merchandise does not import consideration. *Jeffries v. Hager*, 18 Missouri, 272.

As between the original parties, however, the bill is only prima facie evidence of consideration, and it may be inquired into and rebutted. *The People v. Howell*, 4 Johns. 296, 303; *Pearson v. Pearson*, 7 Johns. 26, 28; *Schoonmaker v. Roosa et al.* 17 Johns. 301; *Ryberg et al. v. Snell*, 2 Wash. C. C. Rep. 294. And on the same principle, where the consideration is less than the amount of the bill or note,

The legal effect of drawing a bill, payable to a third person, is a conditional contract by the drawer to pay the payee, his order, or the bearer, as the case may be, if the acceptor do not. The effect of accepting a bill, or making a note, is an absolute contract, on the part of the acceptor of the one, or maker of the other, to pay the payee, or order, or bearer, as the instrument may require. The effect of indorsing is a conditional contract, on the part of the indorser, to pay the immediate or any succeeding indorsee or bearer, in case of the acceptor's or maker's default.⁽¹⁾

*Bonds, bills, notes, and other securities, are not the subjects of larceny at common law. For the words *bona et catalla*, used in indictments, "don't of their proper nature," says Lord Coke, "extend [*3]

no recovery can be had beyond the sum actually paid. *Bramin v. Hess*, 13 Johns. 52; *Brown v. Mott*, 7 Johns. 361; *Mann v. Commission Co.* 15 Johns. 44. So if the holder claim by indorsement *after* the note or bill has become due, or has taken it with a knowledge of fraud or other equitable circumstances, entitling the maker to avail himself of the defence, this is equally provable as a want or failure of consideration between the original parties. It is to be carefully noted as a very important and well-settled distinction, however, that the mere knowledge of the holder when he took the note that it was without consideration as between the original parties, or in other words, an accommodation note or bill, is not available as a defence, and will not be sufficient to throw upon the holder the burden of proving that he gave value, though if it be shown that the note or bill has been put into circulation fraudulently or feloniously, that will shift the onus. *Jarden v. Davis*, 5 Wharton, 338; *Albrecht v. Strimpler*, 7 Barr, 476. But want or failure of consideration may be set up against a holder who takes the instrument after it becomes due. *Barnet v. Offerman*, 7 Watts, 130.

If, however, an action is brought by the indorsee of a bill or note, who has given value for it, before it arrives at maturity, when it is not void in its creation, the consideration in general cannot be the subject of inquiry.

The diversity is founded in this: that to strengthen and facilitate commercial intercourse, which is carried on through the medium of this species of security, it is necessary that the fair holder of a bill for value paid should not be affected by a want of consideration between the prior parties. If, however, the holder of a bill received it without consideration, then, as was justly said by Eyre, C. J., in *Collins v. Martin, et al.*, 1 Bos. and Pul. 651, "He is in privity with the first holder, and will be affected by everything which would affect him." *Lawrence v. Stonington Bank*, 6 Conn. 521.

(1) It should be added, perhaps, and in case proper and prompt measures be taken to fix the indorser by making demand of the acceptor or maker, and giving notice of his default to the indorser. This is that which distinguishes a mercantile indorsement from an ordinary contract of guarantee for the debt or default of another.

to charters and evidences concerning freehold, or inheritance, or obligations, or other deeds or specialities, being things in action.”(e)

In an indictment, bills or notes ought not to be described as chattels.(f)

But, for almost all purposes, they are comprehended under the general words *goods and chattels*, or either of them. Thus, as chattels, they are forfeitable to the Crown, and may be the subject of reputed ownership or fraudulent transfer.(g)(1)

At common law, neither money nor securities for money could be taken in execution, at the suit of a subject. But now, by the 1 & 2 Vict. c. 110, s. 12, money, bank notes, checks, bills, promissory notes, and other securities for money, may be taken in execution. The money and bank notes are to be handed over by the sheriff to the execution creditor, and the sheriff, on receiving a sufficient indemnity, is to sue in his own name, on the checks, bills, and notes.(h)

Bills and notes may be taken under an extent.

A bill, check, or note, or an indorsement thereon, made before the late act, 1 Vict. c. 26, may be a testamentary instrument. A testator gave three checks, at different times, to a lady, and on the corresponding parts of the check-book were found entries by him to the effect that they were given by him to make provision for her in case of his death. The checks were held to be testamentary instruments, giving cumulative legacies.(i) But parol evidence is inadmissible to show that an instrument was only to be payable in case of the testa-

(e) Caley's case, 8 Rep. 33.

(f) Sadi and Morris's case, 2 East, P. C. c. 16, s. 37.

(g) Slade's case, 4 Co. Rep. 93; Bullock v. Dodds, 2 B. & Al. 258; Ryal v. Rolle, 1 Atk. 165; 1 Ves. sen. 363; Hornblower v. Proud, 2 B. & Al. 327; Cumming v. Baily, 6 Bing. 363, E. C. L. R. vol. 19; 4 Moo. & P. 36, S. C.; Edwards v. Cooper, 11 Q. B. Rep. 33; E. C. L. R. vol. 63. See Chapter xxxv. on *Bankruptcy*.

(h) See Chapter xi. on *Transfer*.

(i) Bartholomew v. Henley, 3 Phill. 317.

(1) At common law a chose in action is not the subject of larceny. *United States v. Davis*, 5 Mason, 356; *Culp v. The State*, 1 Porter, 33; *The State v. Calvin*, 2 New Jersey, 207. In most of the States express statutes have been passed, making the stealing of bank notes, promissory notes, and other securities, indictable and punishable as larceny.

tor's death.^(k) An indorsement on a note, as "I give this note to C. D.," may be testamentary.^(l)(1)

*CHAPTER II.

[*4]

OF A PROMISSORY NOTE.

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HOW CONSIDERED AT COMMON LAW		COUNTRY BANK NOTES,	7
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A PROMISSORY note,^(a) or, as it is frequently called, a note of hand, is an absolute^(b) promise in writing, signed but not sealed, to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or to the bearer.^(c)(2)

(k) Woodbridge v. Spooner, 3 B. & Ald. 233; E. C. L. R. vol. 5; 1 Chit. R. 661, S. C.

(l) Chaworth v. Beech, 4 Ves. 565. For the circumstances under which bills and notes will pass under a will, or as a donatio mortis causa, see Chapter xi. on *Transfer*.

(a) As to notes in an irregular form, see post, Chap. vii.

(b) As to conditional instruments, see post, Chapter vii. (c) 2 Bla. Com. 467.

(1) The payer of a note wrote upon the back of it as follows: "If I am not living at the time this is paid, I order the contents to be paid to A. B." He died before the note was paid. The indorsement was held to be entitled to probate as a will. Hunt v. Hunt, 4 New Hamp. 434.

When a promissory note was made in this form: "on demand, after my decease, I promise to pay B., or order," which was delivered to the payee as evidence of the maker's indebtedness to him, it was held that this instrument was not of a testamentary character, to be proved as a will, but was a promissory note, negotiable and irrevocable. Bristol v. Warner, 19 Conn. 7.

(2) A written promise to pay a sum certain, absolutely and unconditionally, at a time specified on its face, is a good promissory note, although a memorandum at

The person who signs the note is called the maker.(1)

At common law, no note of hand was transferable; and before the stat. of 3 & 4 Anne, c. 9, it was the opinion of Lord Holt and the majority of the Judges, that no action could be maintained, even by the payee, on a promissory note as an instrument, but that it was only evidence of a debt.(d) That statute, however, makes promissory notes assignable and indorsable, like bills of exchange, and enables the holder to bring his action on the note itself.

Under the statute of Anne, foreign notes may be declared upon and indorsed. "They are," observes the Court of K. B., "within the words and the spirit of the act; the words are, 'all notes.' The act was made for the advancement of trade, and ought therefore* to receive a liberal construction. It is for the advantage [5] of commerce, that foreign, as well as inland bills should be negotiable."(e) It has been suggested to be a doubtful point, whether this

(d) *Buller v. Cripps*, 6 Mod. 29; *Clerks v. Martin*, 2 Ld. Raym. 757; *Story v. Atkins*, 2 Ld. Raym. 1427; 2 Stra. 719, S. C.; *Brown v. Harraden*, 4. T. R. 148; *Trier v. Bridgman*, 2 East, 359.

(e) *Milne v. Graham*, 1 B. & C. 192; E. C. L. R. vol. 8; 2 D. & R. 294, S. C.; *Houriet v. Morris*, 3 Camp. 303; *Bentley v. Northouse*, 1 M. & M. 66; E. C. L. R.

the foot of it states a different mode in which it may be discharged. *Pool v. McCrary*, 1 Kelly, 319. A certificate of deposit of a certain sum of money, payable at a future day, with interest till due, for the use of a person named, and to his order, is a negotiable promissory note. *Miller v. Austin*, 13 Howard, S. C. Rep. 215; *Carey v. McDougald*, 7 Georgia, 84; *Lowe v. Murphy*, 9 Ibid. 338.

In the case of *Ogden v. Bacon*, 8 Johns, 685, A. gave B. a promissory note payable to B. or order, and at the same time made an indorsement on the note, that it was to be delivered to B. in consideration of a judgment against C., to be assigned to A. by B.; it was held by the court that this was a promissory note, and might be declared on as such notwithstanding the indorsement. These words in a promissory note, "which when paid will be in full of" a certain judgment, does not change the nature of the undertaking. *Ellett v. Britton*, 6 Texas, 229.

(1) It is important to remember this remark. The maker of a note is sometimes called the drawer, but inaccurately. It has a tendency to confound the case of the maker of a note with that of the drawer of a bill. The maker of a note stands in the same position as the acceptor of a bill, liable primarily and at all events, while the drawer of a bill is only liable upon non-acceptance or non-payment and due notice.

The indorser of a note is said to be a drawer of a bill upon the maker accepted in advance, in favor of the indorsee, if the indorsement be special, or in favor of the bearer, if the indorsement is in blank. The position of the drawer of a check on a bank or banker is somewhat peculiar, as he is held to be primarily liable as principal debtor, unless by the failure to present, he has been injured. See *post*.

statute makes English notes assignable abroad,(f) but it is now decided that it does.(g)

No precise form of words is essential to the validity either of a bill of exchange, or of a promissory note.(h)

A note cannot be made by a man to himself without more. But if made to himself *or order*, and indorsed in blank, it becomes a note payable to bearer;(i) and if especially indorsed, it becomes a note payable to the indorsee or order.(k)(1)

A note by which the defendant and four other persons promised to pay 750*l*. "to our and to each of our order," and indorsed by defendant alone, was held good.(l)

vol. 22. But it was at one time thought that the act did not extend to notes made abroad. Carr v. Shaw, H. T. 39 Geo. 3 ; Bay. 22.

(f) De la Chaumette v. the Bank of England, 9 B. & C. 208, E. C. L. R. vol. 17.

(g) S. C. 2 B. & Ad. 385, E. C. L. R. vol. 22. As to the transfer abroad of notes made abroad, and English notes, see the Chapter on *Foreign Bills* and *Foreign Laws*.

(h) Chadwick v. Allen, Stra. 706.

(i) Browne v. De Winton, 17 L. J. 281, C. P. ; 6 C. B. Rep. 336, E. C. L. R. vol. 60, S. C.

(k) Gay v. Lander, 17 L. J. 286, C. P. ; 6 C. B. Rep. 336, E. C. L. R. vol. 60. See also, Wood v. Mytton, 10 Q. B. Rep. 805, E. C. L. R. vol. 59, and Flight v. McClean, 16 M. & W. 51.*

(l) Absolon v. Marks, 11 Q. B. Rep., 19 E. C. L. R. vol. 63.

(1) A note made payable to the maker or order, Miller v. Weeks, 22 Penna. Stat. Rep. 89, and indorsed by him, is a promissory note, and may be declared on as such by the holder, without averring a consideration. Muldrow v. Caldwell, 7 Missouri, 563. A promissory note made payable to the maker's own order, and by him indorsed and delivered, is in legal effect only an ordinary promissory note. The first indorsee does not take a derivative, but a primitive title. Scull v. Edwards, 8 English, 24.

When there is any ambiguity or uncertainty in the terms of the instrument, it may, especially against the party negotiating or making it, be so construed as to give effect to it according to the presumed intention of the parties ; and therefore, where a note was drawn in these terms : "Borrowed of J. S. fifty dollars, which I promise never to pay," it was held the word *never* might be rejected. So where an instrument was in the form of a note, drawn in favor of the maker, and indorsed by him, but addressed to a third person, and the name of that third person written across the face of it, it was held by the Court of King's Bench, to be good as a promissory note. "It is an instrument," said Lord Tenterden, "of an ambiguous nature, and I think that where a party issues an instrument of an ambiguous nature, the law ought to allow the holder, at his option, to treat it, either as a promissory note, or a bill of exchange." Edis v. Bury, 6 Barn. & Cressw. 433 ; 13 Eng. Com. Law Rep. 227.

A note payable to the maker's order, and afterwards indorsed, should be declared on and stamped according to its legal effect.(*m*)

Nor can there be a note by the maker to himself and another man.(*n*)(1)

A note may be made payable by instalments, and yet be within the statute of Anne.(*o*) Days of grace are allowed on each instalment.(*p*)

It is conceived that presentment and notice of dishonor is required when each instalment falls due; but that laches as to one instalment in ordinary cases only discharges an indorser as to that one: and [**6*] that a note payable by instalment *cannot be indorsed over for less than the entire sum due upon it.

A note payable by instalments is within the statute, although it contains a provision that on failure of payment of one instalment, the whole debt is to become payable.(*q*)

A note by two or more makers may be either joint or joint and several. A note signed by more than one person, and beginning, "We promise," &c., is a joint note only. A joint and several note usually expresses that the makers jointly and severally promise. But a note signed by more than one person, and beginning, "I promise,"

(*m*) Hooper v. Williams, 2 Ex. Rep. 13; * Flight v. McClean, 16 M. & W. 451.*

(*n*) See Moffatt v. Van Millingen, 2 Bos. & Pul. 124, n.; Mainwaring v. Newman, Ibid. 120. See Teague v. Hubbard, 8 B. & C. 345, E. C. L. R. vol. 15. But indorsement may remove the difficulty. Quære as to the effect of survivorship.

(*o*) Orridge v. Sherborn, 11 M. & W. 374; * 12 L. J. 313, Ex. S. C.

(*p*) Ibid.

(*q*) Carlon v. Kenealey, 12 M. & W. 139.*

(1) A promissory note, signed by several persons, and payable to one of their number or his order, cannot, in the name of the payee, be enforced at law, as a joint promise against all the signers. But when such note is indorsed to a third person, it immediately becomes operative as a valid contract, from the date of the transfer, and may be enforced by a joint action against all the makers in the name of the indorsee. Heywood v. Wright, 14 New Hamp. 73; Rambo v. Metz, 5 Strobhart, 108. And see Muldrow v. Caldwell, 7 Missouri, 563.

A promise in writing; by one firm, to pay a sum certain, on a specified day, to another firm, both having a common partner, is not a promissory note until assigned; when assigned by the latter firm, the assignee must be regarded, as between himself and the makers, as the real payee, and may maintain an action in his own name, against the makers. Murdock v. Caruthers, 21 Alabama, 785.

&c., is several as well as joint.(*r*) So, a note beginning in the singular, "I promise," and signed by one partner for his copartners, is the joint note of all,(*s*) and has been held to be also the several note of the signing partner.(*t*)(1)

A joint and several note, though on one piece of paper, comprises, in reality and in legal effect, several notes. Thus, if A. B. and C. join in making a joint and several promissory note, there are, in effect, four notes. There is the joint note of the three makers, and there are also the several notes of each of the three.(*u*)(2)

(*r*) *March v. Ward*, Peake's Rep. 130 ; *Clerk v. Blackstock*, Holt, N. P. C. 474. So a bond in the singular number, executed by several, is several as well as joint. *Sayer v. Chaytor*, 1 Lutw. 695 ; *Galway v. Mathew*, 1 Camp. 403 ; 10 East, 264, S. C. As to a joint or joint and several warrant of attorney, see *Dalrymple v. Fraser*, 15 L. J. 193, C. P. ; 2 C. B. 698, E. C. L. R. vol. 52, S. C.

(*s*) *Doty v. Smith*, 11 Johnson's American Rep. 543.

(*t*) *Hall v. Smith*, 1 B. & Cress. 407, E. C. L. R. vol. 8 ; 2 Dowl. & R. 584 ; *Lord Galway v. Mathew*, 1 Camp. 403. But *Hall v. Smith* seems to be overruled in *Ex parte Buckley*, 14 M. & W. 475 ;* 15 L. J. Bkcy. 3, S. C.

(*u*) See the observations of Parke, B., in *King v. Hoare*, 13 M. & W. 505.*

(1) A note in the form, "I promise," &c., subscribed by two persons, is a joint and several note. *Hemmenway v. Stone*, 7 Mass. 58 ; *Barnet v. Skinner*, 2 Bailey, 88 ; *Partridge v. Calby*, 19 Barbour, S. C. Rep. 248 ; *Ladd v. Baker*, 6 Foster, 76.

Persons who sign their names to a note will be presumed to be joint makers in the absence of anything to the contrary on the face of the note. *Johnson v. King*, 20 Alabama, 270 ; *Chandler v. Ruddick*, 1 Carter (Indiana), 391. If one of two joint debtors, not copartners, give a note for their debt, signed in their joint names, a ratification by the other renders the note valid against both ; and a subsequent promise by such other debtor to pay the note, made with a full knowledge of the facts, is a sufficient ratification. *Waite v. Foster*, 33 Maine, 424.

When a note is made by two persons, which in terms is joint only, on the death of one of the makers, the surviving maker is only liable on it, unless it appears by direct proof, or the facts of the case warrant the inference, that it should be joint and several. Then the representatives of the deceased maker are liable. *Yorks v. Peck*, 14 Barbour, 644.

(2) What is thus stated broadly, certainly requires to be received with some modification. A joint and several note by A. B. and C. is not the separate note of each to all intents and purposes. The payee could not indorse A.'s note to one, B.'s note to another, and C.'s note to a third person ; nor could he even make a separate transfer of the proportionate liability of each maker, without the consent of all three. Their consent might make a new special contract on the part of each to pay the assignee of each his proportion. In regard to the remedy, there is also an important distinction to be borne in mind. The holder may sue all the makers jointly, or each severally, but he cannot do both. As to remedy, then, there are not four notes, but either one or three, at the election of the holder. A suit against

Where a note is on its face joint, or joint and several, it is conceived that evidence to show that one maker is surety for the other, (v) is inadmissible at law, if the question arise between the creditor and the surety; but evidence to that effect has been received. (w)(1)

(v) Price v. Edmunds, 10 B. & C. 578, E. C. L. R. vol. 21.

(w) Garrett v. Jull, S. N. P. 377; Hall v. Wilcox, 1 M. & Rob. 58. The admission of such evidence seems to contravene the general rule of law, that parol evidence is inadmissible to vary or explain a written contract. Where the indorsee sues, another objection interposes, that the indorsee would be affected by a contract of which he had no notice. Besides, from the case of Fentum v. Pococke, 5 Taunt. 192, 1 Marsh. 14, S. C., which has been recognized as law ever since it was decided, this general principle seems to result, that parties to a negotiable security shall be held to the consequences of the characters which they severally assume on the face of the instrument. And see Perfect v. Musgrave, 6 Price, 111, and Chapter xviii. on *Principal and Surety*.

the three jointly would preclude an action against each—severally—and *e contra*. Buller, J., in *Streatfield v. Halliday*, 3 Term. Rep. 782.

The case of *King and another v. Hoare*, 13 Meeson & Welsby, 494, which is relied on as the authority for the doctrine of the text, decides merely that a judgment (without satisfaction) recovered against one of two joint debtors is a bar to an action against the other. *Secus* when the debt is joint and several. "The distinction," says Baron Parke, "between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable; and so he is in one sense, that if sued separately, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable, in the same sense, as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all, and the several bonds of each of the obligors, and gives different remedies to the obligee." This is very true, but can hardly be said to support the position, that such a bond is in legal effect four distinct bonds.

It has been decided in Ohio, that, in cases of a joint and several note, the promisors are to be deemed, *quoad hoc*, as partners, and a demand upon one is a demand upon all. *Harris v. Clark*, 10 Ohio, 5. Judge Story, indeed, seems inclined to the opinion that, even in the case of a joint note by several persons not partners, there must be a separate demand or due diligence shown in regard to each maker. *Story on Notes*, § 239, 255. However this may be, it is plain that it would not be true, as stated in the text, that a joint and several note by three, is in effect four notes. If a demand upon one is sufficient, it is because the holder has a right to elect, to consider it a joint note; or if demand on all three is necessary, it is still in legal effect but one note, otherwise a different result would follow.

(1) Parol evidence is admissible to show the intention of the parties to a note, at the time the contract was entered into, with regard to their several liabilities among themselves, and the relations which they were to bear to the note. *Branch Bank v. Coleman*, 20 Alabama, 140; *Robison v. Lyle*, 10 Barb. Sup. Ct. 512; *Smith v. Doak*, 3 Texas, 215. It would clearly be inadmissible as against a *bona fide* holder without notice.

Where, however, the question *arises between the principal debtor and the sureties, such evidence is admissible. [*7]

A bank note is a promissory note, made by the banker, payable to bearer on demand, and intended to circulate as money.(x)

The term bank note is sometimes used indiscriminately for the note of a country bank, or the note of the Governor and Company of the Bank of England, but, in law books, a bank note is commonly taken to mean a Bank of England note. "Bank notes," says Lord Mansfield, "are not goods, not securities or documents for debts, nor are they so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money, to *all* intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash. They pass by a will which bequeaths all the testator's money or cash, and are never considered as securities for money, but as money itself. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for security or notes. So, on bankruptcies, they cannot be followed as identical, and distinguishable from money, but are always considered as money or cash."(y) Like money, they cannot, at common law, be taken in execution.(z) (1)

(x) As to the power of the Bank of England and other banks to issue promissory notes, see the Chapter on the *Capacity of Parties to a Bill or Note*.

(y) *Miller v. Race*, 1 Burr, 452; *Fleming v. Brooke*, 1 Sch. & Lefr. 318, 11 Ves. 662; *Drury v. Smith*, 1 P. W. 404; *Miller v. Miller*, 3 P. W. 356, Ambler, 68.

(z) *Francis v. Nash*, Rep. temp. Hardwicke, 53; *Knight v. Criddle*, 9 East, 48; *Armistead v. Philpot*, 1 Dougl. 219; *Fieldhouse v. Croft*, 4 East, 510.

(1) For every purpose, in the ordinary transaction of business, except that of a legal tender, bank notes are considered as money. *Edwards v. Morris*, 1 Hammond, 524; *Bradley v. Hunt*, 5 Gill & Johns. 58; *Morrill v. Brown*, 15 Pick. 177; *Pierson v. Wallace*, 2 English, 282.

Bank *post notes*, being intended to circulate after they are due, like other bank notes, are not subject to the rules applicable to ordinary promissory notes, but are assimilated to ordinary bank notes. *Fulton Bank v. Phoenix Bank*, 1 Hall, 577.

It seems that a judgment on a negotiable note, passing from hand to hand, as a bank note, prevents any further use of it as such by the holder. *Lockhart v. United States Bank*, 2 Ashmead, 405.

A note issued by a bank, in violation of its charter, or in contravention of the provisions of a public law in force at the time of the adoption of its charter, is void

Gold coin was formerly the only legal tender above a certain amount; (a) bank notes were, nevertheless, a good tender, unless objected to on that account. (b) But it is enacted, by 3 & 4 Wm. 4, c. 98, s. 6, that Bank of England notes shall be a legal tender for all sums above 5*l.*, except at the Bank of England or its branches.

Formerly, money was kept with goldsmiths, who, about the year 1670, introduced, as receipts for deposits, promissory notes, payable [*8] to bearer, called Goldsmiths' Notes; the assignable *quality of these notes was strenuously denied by Lord Chief Justice Holt, in the reign of Queen Anne. At length, the stat. 3 & 4 Anne, c. 9, made them assignable like bills. Checks on bankers have now superseded goldsmiths' notes, in London; but bankers' cash notes, or, as they were formerly called, *shop notes*, and country bank notes, are now what goldsmiths' notes were formerly. (1)

Country bank notes are also a legal tender, unless objected to, and are considered as cash. (c)

Assumpsit for money had and received, will lie for country bank notes and checks which have been treated as money, (d) but not other-

(a) 56 Geo. 3, c. 68, s. 11.

(b) Wright v. Reed, 3 T. R. 554; Grigby v. Oakes, 2 B. & P. 526; Brown v. Saul, 4 Esp. 267.

(c) Chitty, 521, 2; Owenson v. Morse, 7 T. R. 64; Ward v. Evans, 2 Ld. Raym. 928; Tiley v. Coursier, K. B. 1817, overruling Mills v. Stafford, Peake, N. P. 240, n.; Lockyer v. Jones, Peake, N. P. 240 n.; Polglass v. Oliver, 2 C. & J. 15,* 2 Tyr. 89, S. C.

(d) Pickard v. Bankes, 13 East, 20; Spratt v. Hobhouse, 4 Bing. 173,* E. C. L. R. vol. 13; 12 Moo. 395, S. C.

ab initio, and no action can be maintained on such note by the indorsee against the indorser. Root v. Wallace, 4 McLean, 8; Davis v. Bank, Ibid. 387. The notes issued by a bank organized under an unconstitutional law are void, and constitute no consideration for a promissory note. Skinner v. Dearing, 2 Carter (Ind.), 558.

(1) "Goldsmiths' or bankers' notes, to which checks have been likened, are seldom now used, but have been superseded by the introduction of checks, which, on account of their being payable on demand, are considered as cash, and, like bankers' checks, are transferable by delivery, and are governed by the same laws and rules as bills of exchange. So long ago as the time of Lord Holt (Ld. Raym. 744, 1 Salk. 132) goldsmiths' bills were held to be governed by the rules of bills of exchange, and if the money be demanded in a reasonable time and not paid, it will charge him who gave the bill." Per Kent, J., in Cruger v. Armstrong, 3 Johns. Cas. 5.

wise;(e) for it has been held that an action for money had and received will not lie against the finder of lost notes unless they have been turned into money.(1)

No precise words of contract are essential in a promissory note, provided they amount in legal effect to a promise to pay. Thus, "I promise to account with A. B. or order, for 50*l.*, value received by me," has been held a good note within the statute.(f) So, "I do acknowledge myself to be indebted to A. in 100*l.*, to be paid on demand, for value received," was, after solemn argument, held to be a good note within the statute, the words, "*to be paid*," amounting to a promise to pay; the Court observing, that the same words in a lease would amount to a covenant to pay rent.(g) And where, for *an executed consideration, a note was given, expressed to be [*9]

(e) *Noyse v. Price*, Chitty, 524.

(f) *Morris v. Lee*, 2 *Ld. Raym.* 1396, 1 *Stra.* 629, 8 *Mod.* 362, S. C.

(g) *Casborne v. Dutton*, S. N. P. 381; *Brooke v. Elkins*, 2 *M. & Wels.* 74.* But in *Horne v. Redfearne* (4 *Bing. N. C.* 433, *E. C. L. R.* vol. 33; 6 *Scott*, 260, S. C.), the following instrument was held not to be a promissory note: "I have received the 20*l.* which I borrowed of you, and I have to be accountable for the same sum with interest."

In *Jarvis v. Wilkins*, 7 *M. & W.* 410,* the following instrument was held to be a guarantee, and not a note: "Sept. 11, 1839. I undertake to pay to Mr. Robert Jarvis the sum of 6*l.* 4*s.* for a suit of clothes ordered by Daniel Page." The Court observed that the expression "ordered" showed that the consideration was executory.

"I, R. J. M., owe Mrs. E. the sum of 6*l.*, which is to be paid by instalment for rent. Signed, R. J. M." Held not to be a promissory note, as no time was stipulated for the payment of the instalments. *Moffatt v. Edwards*, 1 *Carr. & M.* 16, *E. C. L. R.* vol. 41.

"Memo. Mr. Sibree has this day deposited with me 500*l.* on the sale of 10,300*l.*

(1) Bank notes and any other property received *as money* will support the action, the same as if money itself had been received. **Mason v. Waite*, 17 *Mass.* 560; *Ainslie v. Wilson*, 7 *Cowen*, 662; *Arms v. Ashley*, 4 *Pick.* 74; *Murray v. Pate*, 6 *Dana*, 335; *Kellogg v. Budling*, 7 *Howard (Miss.)*, 340; *Houx v. Rufull*, 10 *Mis-souri*, 246; *Muir v. Rand*, 2 *Carter (Indiana)*, 291.

Negotiable notes received by defendant are often regarded as money. *Floyd v. Day*, 3 *Mass.* 405; *Hemmenway v. Bradford*, 14 *Mass.* 122; *Willie v. Green*, 2 *N. Hamp.* 333; *contra*, *Mercer v. Tolen*, *Anthon*, 119.

Positive evidence is not, in all cases, necessary, that the defendant has received money belonging to the plaintiff; but when, from the facts proved, it is a fair presumption that he has received it, the action is maintainable. *Tuttle v. Mayo*, 7 *Johns.* 132; *Hatten v. Robinson*, 4 *Blackford*, 479; *Haskins v. Dunham*, *Anthon*, 81; *Hutchinson v. Phillips*, 6 *English*, 270; *Mair v. Rand*, 2 *Carter (Indiana)*, 291.

"for 20*l.*, borrowed and received," but at the end were the words, "which I promise *never* to pay," Lord Macclesfield rejected the word *never*.^(h) For a contract ought to be expounded in that sense in which the party making it apprehended that the other party understood it.⁽¹⁾

If there be no words amounting to a promise, the instrument is merely evidence of a debt, and may be received as such between the original parties.⁽ⁱ⁾ Such is the common memorandum, I. O. U.^(k)

A promissory note is not the less a note, because it contains a recital that the maker has deposited title deeds with the payee as a collateral security.^(l) But an agreement to give further security in future would invalidate the instrument as a promissory note.^(m)

3*l.* per cent. Spanish, to be returned on demand." Held not to be a promissory note. *Sibree v. Tripp*, 15 L. J. Ex. 318; 15 M. & W. 23,* S. C.

"Borrowed of Mr. J. White the sum of 200*l.* to account for on behalf of the Alliance Club at two months' notice if required," was held not to be a note. *White v. North*, 18 L. J. 316, Exch.; 3 Exch. Rep. 689,* S. C.

The following instrument was held to be a promissory note: "John Mason, 14th Feb. 1836, borrowed of Mary Ann Mason, his sister, the sum of 14*l.* in cash, a loan, in promise of payment of which I am truly thankful for." *Ellis v. Mason*, 7 Dow. 598.

A letter in this form is a promissory note: "Gentlemen, I have received the imperfect books, which, together with the costs overpaid on the settlement of your account, amounts to 80*l.* 7*s.*, which sum I will pay you within two years from this date. I am, Gentlemen, your obedient servant,

Thos. Williams."

Wheatley v. Williams, 1 M. & W. 533.*

A promise to pay or cause to be paid is a good note. *Dixon v. Nuttal*, 6 C. & P. 320, E. C. L. R. vol. 25, 1 C. M. & R. 307.*

(*h*) 2 Atkyns, 32; *Allan v. Mawson*, 4 Camp. 115, Bayley, 5 Ed. 5.

(*i*) *Wayman v. Bend*, 1 Camp. 175.

(*k*) *Israel v. Israel*, 1 Camp. 499; *Fisher v. Leslie*, 1 Esp. 426; *Childers v. Boulnois*, D. & R., N. P. C. 8. But see *Guy v. Harris*, Chit. 526, where Lord Eldon held such an instrument to be a promissory note. But it clearly is not such at this day. See *Tompkins v. Ashby*, 6 B. & C. 541, E. C. L. R. vol. 13, 9 D. & R. 543, 1 M. & M. 32, S. C. See further on this subject Chapter iv. on an I. O. U.

(*l*) *Wise v. Charlton*, 4 Ad. & E. 786, E. C. L. R. vol. 31, 6 N. & M. 364, 2 Har. & W. 49, S. C.; *Fancourt v. Thorn*, 15 L. J., Q. B. 344. But such a note will generally require a mortgage stamp, which may, however, be impressed on the note after it is made. See further Chapter xxiii. on *Interest* and *Usury*.

(*m*) See Chapter xii. on *Irregular Instruments*.

(1) See *Edis v. Bury*, 6 Barnw. & Cressw. 433, 13 Eng. Com. Law, 227.

*CHAPTER III.

[*10]

OF A CHECK ON A BANKER.

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A CHECK on a banker is, in legal effect, an inland bill of exchange, drawn on a banker, payable to bearer, on demand. A check is consequently subject, in general, to the rules which regulate the rights and liabilities of parties to bills of exchange. Checks on bankers, however, have of late years come into use so frequent, as commonly to supersede in payments of any considerable amount, not only gold and silver coin, but bank notes themselves. With their universal use have grown up certain usages peculiar to checks, which usages are now engrafted on the commercial law of the country.(1) Moreover, the legis-

(1) A bank check is substantially the same as an inland bill of exchange: it passes by delivery, when payable to bearer, and the rules, as to presentment, diligence of the holder, &c., which are applicable to the one, are generally applicable to the other. *Woods v. Schrader*, 4 Har. & J. 276; *Cruger v. Armstrong*, 3 Johns. Cas. 5; *Conroy v. Warren*, Ib. 259; *Merchants Bank v. Spicer*, 6 Wend. 445; *Murray v. Judah*, 6 Cow. 484; *Glenn v. Noble*, 1 Blackf. 104; *Smith v. James*, 20 Wend. 192; *Bowen v. Newell*, 4 Selden, 190.

It is said by Judge Cowen, in *Hooker v. Anderson*, 21 Wend. 372, that a check is a bill of exchange payable on demand; and he refers to *Brown v. Lush*, 4 Yerger, 216, in which a draft payable at a certain day after date was held not to be a

lature having exempted them from stamp duty, questions have arisen as to what instruments are or are not within the exemption, and as to the consequences of attempts to violate the provisions of the Stamp

check. This case is said to have been determined on the authority of a passage in Chitty on Bills (7 Am. Ed. 322, 10th Am. Ed. 512). "Checks are not due before payment is demanded, in which respect they differ from bills of exchange and promissory notes payable on a particular day." The passage by no means warrants the inference; but if it did, it would find no support in the authority Chitty cites. Judge Story entirely repudiates such a distinction. In the matter of Brown, 2 Story Rep. 502, he says: "A check is not less a check because it is post dated, and thereby becomes, in effect, payable at a future and different time from that in which it is drawn or issued. This is sufficiently apparent from the case of Allen v. Reeves, 1 East Rep. 435. That it may be declared upon as a bill of exchange is no proof that it may not also be declared upon as a check. In many cases they are identical in their legal results; but by no means in all. Mr. Chitty very properly says, that a check *nearly* resembles a bill of exchange; but (he adds) it is uniformly made payable to bearer, and should be drawn upon a banker or a person acting as such. Chitty on Bills, 10 Am. Ed. p. 511. I agree that it nearly resembles a bill of exchange; but *nullum simile est idem*. It is commonly although not always made payable to the bearer; but I conceive it to be still a check, if drawn on a bank or banker, although payable to a particular party only by name, or to him or his order. It is usually, also, made payable on demand; although I am not aware that this is an essential requisite. The distinguishing characteristics of checks, as contradistinguished from bills of exchange are (as it seems to me) that they are always drawn on a bank or banker; that they are payable immediately on presentment without the allowance of any days of grace; and that they are never presentable for mere acceptance, but only for payment." Although checks are not presentable for acceptance before they are payable, yet they are sometimes presented for acceptance, or what amounts to acceptance. They are marked "good" by the bank officer, and charged to the account of the drawer as paid. See post, p. 15, note 1.

Chancellor Kent (3 Kent's Com. 104, n. 7th Ed.) questions Judge Cowen's doctrine in the same case, that a check is, to all intents and purposes, but a bill of exchange. He says, "A check differs from a bill of exchange in several particulars. It has no days of grace, and requires no acceptance, distinct from prompt payment. The drawer of a check is not a surety, but the principal debtor, as much as the maker of a promissory note. It is an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought to remain until called for, and the drawer has no reason to complain of delay, unless upon the intermediate failure of his banker. By unreasonable delay in such a case, the holder takes the risk of the failure of the person or bank on which the check is drawn. This is quite distinct from the strict rule of diligence applicable to a surety, in which light stands the indorser." This view has been adopted by judicial authority. Daniels v. Kyle, 1 Kelly, 304. A check post-dated is payable on the day of its date without any days of grace. Mohawk Bank v. Broderick, 10 Wendell, 405; Salter v. Burt, 20 Wendell, 205.

It has since been held in New York, in conformity to the views of Story & Kent,

Acts. In this Chapter it is intended to point out some of those qualities and incidents, which distinguish checks from other bills. The learned reader will perhaps think that such observations are at present premature, *but it has been thought conducive to perspicuity, [*11] that the rest of the book should be disembarrassed of distinctions solely applicable to checks, and that a summary of the law peculiarly relating to them, should be attempted in the same part of the work, where observations relating peculiarly to bills or notes are to be found. It is hoped that any obscurity, caused by anticipating what is to follow, will be removed by turning to subsequent Chapters.

The present general Stamp Act, (a) while it subjects bills in general to stamps, exempts from all stamp duties—

All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker, within *ten miles* (now *fifteen miles*, 9 Geo. 4, c. 49, s. 15), (b) of the place where such drafts or orders shall be issued, (c) provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and providing the same do not direct the payment to be made by bills or promissory notes.

In order, therefore, to bring checks within the exemption, they must be drawn on a banker, (d) must specify truly the place where actually drawn, (e) and that place must be within fifteen miles of the

(a) 55 Geo. 3, c. 184, Sched.

(b) If a defendant wish to avail himself of this defence, he should plead that he did not make the check declared on. McDowell v. Lyster, 2 M. & W. 52; * Field v. Woods, 7 Ad. & E. 114, E. C. L. R. vol. 34, 2 N. & P. 117, 6 Dowl. 23, S. C.

(c) What not an issuing, Ex parte Bignold, 2 Mont. & Ayr. 663; 1 Deac. 712, S. C. Chitty, 118.

(d) Castleman v. Ray, 2 Bos. & Pul. 383.

(e) Walters v. Brogden, 1 Y. & J. 457; * Bopart v. Hicks, 18 L. J. 33, Exch., 3 Exch. Rep. 1, * S. C. 8 Q. B. Rep. 674, E. C. L. R. vol. 55, S. C. Where a person residing in a country house four miles from Llannelly, actually dated it as if drawn at Llannelly, it was held that the check was void for want of a stamp. Walters v. Brogden, 1 Y. & J. 457; * Field v. Woods, 7 Ad. & Ell. 114, E. C. L. R. vol. 34, 2 N. & P. 117, 6 Dowl. 23, S. C.; and see Rex v. Pooley, 3 B. & P. 311; see also Strickland v. Mansfield, 15 L. J. 226, Q. B., where it was held that the superscription "DORCHESTER OLD BANK, ESTABLISHED IN 1786," printed on a check was a sufficient designation of the place where drawn, in the absence of proof that it was not drawn there.

that a written order on a bank to pay a sum of money on a future day named, is a check, and is not entitled to grace. Bowen v. Newell, 5 Sandford, 326, S. C. 2 Duer, 584, 4 Selden, 590.

banker's place of business, they must be payable to bearer(*f*) on [*12] demand, must not be *postdated, (*g*) nor direct the payment to be made by bills or notes. (*h*)

The penalties attached to checks made under color of this exemption, but not falling strictly within it, are extremely severe. For the 55th Geo. 3, c. 184, s. 13, enacts, that if any person shall make or issue any check(*i*) or draft on a banker, payable to bearer on demand, not duly stamped, and not falling in every respect within the exemption, the drawer shall forfeit 100*l.*, any person *knowingly* taking it 20*l.*, the banker *knowingly* paying it 100*l.*; and the banker shall not be allowed it in account against the persons *by* whom or *for* whom it was drawn, or against any person claiming under them respectively. (*j*)

Where the defendants, knowing a check to be postdated, and therefore void, and that the drawers are insolvent, presented it for payment to the bankers on whom it was drawn, who without knowledge of these facts paid the amount, though they had no funds of the drawer's in their hands at the time, but expected some in the course of the day, it was held that the bankers were entitled to recover the money back in an action for money had and received. (*k*)

A check for less than the sum of 20*s.* is absolutely void, and the uttering or negotiating such an instrument is an offence subjecting the offender to a penalty of 20*l.*, mitigable to 5*l.* (*l*) So also it is an offence to utter a check on which less than 20*s.* remains due. (*m*) While the 17 Geo. 3, c. 30, was in force, and not controlled by any other statute, a check could not be drawn for a sum under 5*l.* But the 7 Geo. 4, c. 6, which repeals the act repealing the 17 Geo. 3, c.

(*f*) *Rex v. Yates*, Moo. C. C. 170; *Carrington's Criminal Law*, 3d ed. 273, S. C. The twelve Judges there decided that a check payable to D. F. J., and not to bearer, was not within the exception in the Stamp Act in favor of checks, and ought to have been stamped as a bill, and not being so, was not a "valuable security" within the 7 & 8 Geo. 4, c. 29, s. 5, and an indictment for larceny was not sustainable. But a man who steals a void check may be convicted of larceny of a piece of paper. *Reg. v. Perry*, 1 Car. & K. 725, E. C. L. R. vol. 47.

(*g*) *Allen v. Keeves*, 1 East, 435, 3 Esp. 281, S. C.; *Whitwell v. Bennett*, 3 B. P. 559.

(*h*) 55 Geo. 3, c. 184, sched. part 1, and 9 Geo. 4, c. 49, s. 15.

(*i*) *Ex parte Bignold*, *supra*.

(*j*) See *Green v. Allday*, 1 Gale, 218.

(*k*) *Martin v. Morgan*, Gow. 123, 1 B. & B. 289, E. C. L. R. vol. 5; 3 Moore, 635, S. C.

(*l*) 48 Geo. 3, c. 88, s. 3.

(*m*) *Ibid*.

30, and consequently revives that act, enacts,⁽ⁿ⁾ that nothing in that latter act^(o) contained shall extend to any draft drawn by a man on his own banker *for money held by that banker to the use of the drawer*. It seems to be generally considered, therefore, that a check for an amount above 20s. and under 5l. is good,^(p) but nevertheless it may be illegal to utter such a check where a man has no balance at his banker's though the banker be likely to pay it.

*Generally speaking, the drawee of a bill is not liable till acceptance. But a banker, having in his hands effects of his customer, is an exception to this rule:^(q) he is bound, within a reasonable time after he has received the money, to pay his customer's checks, and is liable to an action at the suit of the customer if he do not. For there is an implied contract between banker and customer, that the banker shall pay the customer's checks; and the customer's credit may be seriously impaired by a refusal. M. kept his account with Williams and Co., bankers. One day, in the morning, the balance in their hands, due to M., was 69l. 16s. 6d. About one o'clock on the same day a 40l. Bank of England note was paid into M.'s account; a little after three o'clock, a check drawn by M. for 87l. 7s. 6d., was presented. The clerk, after having referred to a book, said, there were not sufficient assets, but that the check might, probably, go through the clearing house. On the following day the check was paid. M. brought a special action on the case against the bankers. No actual damage was proved, but the jury found a verdict for the plaintiff with nominal damages. On a rule for a new trial, "I cannot forbear to observe," says Lord Tenterden, "that it is a discredit to a person, and therefore injurious, in fact, to have a draft refused payment for so small a sum; for it shows that the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade. My judgment in this case, however, proceeds on the ground, that the action is founded on a contract between the plaintiff and the bankers—that the bankers, whenever they should have money in their hands belonging to the plaintiff, or within a reasonable time after they should have received such money, would pay his checks: and there having been a breach of such contract, the plaintiff is entitled to recover damages."

(n) Sec. 9.

(o) 7 Geo. 4, c. 6.

(p) See 17 Geo. 3, c. 30, s. 20.

(q) *Marzetti v. Williams*, 1 B. & Ad. 415, E. C. L. R. vol. 20, 1 Tyr. 77 n. (b), S. C.

But if the funds in the banker's hands have been applied to the payment of the customer's acceptance, made payable at the banker's, though without any further authority, that is a defence to an action for dishonoring the check.^(r) (1)

We have already observed, that checks are in legal effect inland bills of exchange, payable to bearer on demand; and we shall hereafter see, that an ordinary bill of exchange, payable on demand, must be presented for payment, or, if the parties live at a distance, forwarded for presentment within a reasonable time, which is generally held to comprehend the day after it is issued.

[*14] *Such also is the general rule as to the presentment of checks, when the question of due presentment arises between the holder and a transferer not being the drawer. "The result of the cases," says Tindal, C. J., "from *Rickford v. Ridge* to *Boddington v. Schlencker*, is that the party receiving a check, has till the following day to present it, where there are the ordinary means of doing so."^(s) Formerly, it was held, that the check must be presented on the *morning* of the next day; it is now, however, firmly established, that the holder has the whole of the banking hours of the next day within which to present it.^(t) Government checks are not payable at the Bank of England after three o'clock.^(u)

But there is a material difference between the liability of the *drawer* of a check and the drawer of a bill.

The drawer of a check is not discharged by the holder's failure to present in due time, unless he have sustained actual prejudice, as by the failure of the banker.^(v) (2)

^(r) *Kymer v. Laurie*, 18 L. J. 218, Q. B.

^(s) *Moule v. Brown*, 4 Bing. N. Ca. 268, E. C. L. R. vol. 33, 5 Scott, 694, S. C.

^(t) *Pocklington v. Sylvester*, 1817, Chitty, 385; *Bobson v. Bennett*, 2 Taunt. 388; *Rickford v. Ridge*, 2 Camp. 537. ^(u) 4 & 5 Wm. 4, c. 15, s. 21.

^(v) *Serle v. Norton*, 2 Mood. & Rob. 401; *Alexander v. Burchfield*, 3 Scott, N. R. 555, 7 M. & G. 1067, E. C. L. R. vol. 49, S. C.; *Robinson v. Hawksford*, 9 Q. B. Rep. 52, E. C. L. R. vol. 58.

(1) As it is the duty of the acceptor of a bill to provide funds to pay it, if funds are deposited in a bank for that purpose, the presumption of law is that they were deposited by the acceptor; and unless this presumption is contradicted by proof, the acceptor is the only person who can maintain an action against the bank for neglect to apply the funds to the purpose for which they were deposited. *Thatcher v. Bank*, 5 Sandford, 121.

(2) *Daniels v. Kyle*, 1 Kelly, 304. In *Little v. Phoenix Bank*, 2 Hill, 425, C. J. Nelson and J. Bronson held, that as between the holder and drawer mere delay in

If the payee of the check pay it into his bankers that they may present it, the bankers may be, as between their customers and the

presenting a check for payment would not discharge the latter, unless he had been injured thereby; that it was incumbent upon the holder, however, in an action upon the check, to show affirmatively that no loss had happened to the drawer. Cowen, J., adhered to the opinion expressed by him in *Hooker v. Anderson*, 21 Wend. 372, that irrespective of the question of loss or injury to the drawer, a check must be presented for payment within a reasonable time, or both the drawer and indorser will be discharged; and see *Bowen v. Newell*, 5 Sandf. 326. As a general rule, however, a check is not due from the drawer, until payment has been demanded from the drawee and refused by him. Demand and refusal therefore before suit brought is an essential preliminary to an action against the drawer. *Murray v. Judah*, 6 Cowen, 484; *Hooker v. Anderson*, 21 Wend. 372; *Sherman v. Comstock*, 2 McLean, 19; *Daniels v. Kyle*, 5 Georgia, 245. As between the holder of a check and an indorser or third person, payment must be demanded within a reasonable time. *Murray v. Judah*, 6 Cowen, 484. When the parties all reside in the same place, the holder should present the check on the day it is received or on the following day, and when payable at a different place from that in which it is negotiated, the check should be forwarded by mail on the same or the next succeeding day for presentment. It has been said that greater diligence is necessary in presenting checks for payment than is required in relation to bills of exchange. *Gough v. States*, 13 Wend. 549. But there seems to be no good reason for making such a distinction. The fact that one instrument is drawn upon a bank, and the other upon an individual, can make no difference in principle concerning the duty of the holder. What will be due diligence in the one case, will be due diligence in the other. *Mohawk Bank v. Broderick*, 13 Wendell, 133; *Janes v. Smith*, 20 Wendell, 192. Where a postdated bank check falls due on Sunday, presentment must be made on the following Monday, and notice of non-payment given in order to fix the indorser. *Salter v. Burt*, 20 Wendell, 205.

If the drawer of a check payable instantly have no funds in the bank at the time, it is a fraud, and the holder can sustain an action upon it without presentment for payment or notice. *True v. Thomas*, 16 Maine, 36; *Hoyt v. Seeley*, 18 Conn. 353. But it cannot be maintained that the drawer of a bill or check should have in the hands of him on whom he draws, money or cash in order to exact due diligence of the holder of the bill or check. In the absence of all authority on this subject, reason would dictate that the drawer is as much exposed to loss from the want of diligence of the holder when he has property or effects in the hands of the person on whom he draws, as when he has money. *St. Johns v. Homans*, 8 Missouri, 382; see *Cruger v. Armstrong*, 3 Johns. Cas. 5; *Edwards v. Moses*, 2 Nott and McCord, 433; *Commercial Bank v. Hughes*, 17 Wendell, 94; *Hooker v. Anderson*, 21 Wendell, 372. The true doctrine on this point seems to be this, that if the drawer has a right to draw in the belief that he has funds or in the expectation that he shall have funds at the time of presentment, by reason of arrangements with the drawee or putting his funds in transitu, adequate to meet the check, then he is entitled to insist upon presentment and notice. In the matter of *Brown*, 2 Story Rep. 516.

One who takes a check long over due, having on its face a time appointed for its

drawer, still bound to present it on the day after it was issued. But as between their customer and themselves they may be bound to present it earlier, or justified in postponing the presentment later.(w)

If the party receiving the check from the drawer do not live in the same place with the drawee, he should send it to his banker or other agent by the next day's post, and they should present it on the day after they have received it.(x) The banker should send it direct to the drawee, and cannot postpone the time of presentment by circulating it through agents or branches of the bank.(y) He must not keep it till the third day, and then present it, though, by such a course, it reach the drawee as soon as it would have done had it been despatched by post in the regular course.(z)

But where a check, instead of being presented for payment in due

(w) *Boddington v. Schlenker*, 4 B. & Ad. 752, E. C. L. R. vol. 24, 1 N. & M. 540, S. C. ; *Alexander v. Burchfield*, 1 Carr. & M. 75, E. C. L. R. vol. 41 ; 3 Scott, N. R. 555, E. C. L. R. vol. 36 ; 7 M. & G. 1067, E. C. L. R. vol. 49, S. C.

(x) *Richford v. Ridge*, 2 Camp. 537.

(y) *Moule v. Brown*, 4 Bing. N. Ca. 266, E. C. L. R. vol. 33, 5 Scott, 694, S. C.

(z) *Beeching v. Gower*, Holt's N. P. Ca. 315.

payment, takes it exclusively on the credit of the indorser, and subject to the equities between the original parties. Hence the drawer of such a check, who has paid the money called for by it to the payee before it was payable, is not liable thereon to the bank on which it was drawn, which more than a year after it was due, paid it out of its own funds on the credit of the drawer, the latter not having funds in the bank to pay it when it became due, or when it was paid by the bank, and not having given to the said bank notice of its payment by himself. The *Lancaster Bank v. Woodward*, 18 Penna. State Rep. 357. Woodward J., "It was attempted to prove a custom to pay overdrafts of solvent dealers with banks, but it failed; and if it had not failed, such a custom should be abolished. *Malus usus abolendus est*. Our banking institutions are generally conducted by boards of directors, to whom stockholders look for the proper use and management of the capital invested; whilst the ordinary routine of daily business is intrusted to cashiers and clerks, who are not directors, generally not stockholders, and who have no power to discount paper. If then subordinate officers might pay checks, which are properly drafts on funds deposited, when there were no funds of the drawer on deposit, the capital of banks would be liable to perversion to purposes and in modes that were never contemplated either by the legislature or the stockholders. That the practice of paying overdrafts was proved to some extent, is quite likely; and it may be true that boards of directors have in some instances sanctioned it; but it has no authority in sound usage or in law. The more nearly these institutions keep in the line of regular business transactions, the more effectually will they accommodate the public and secure their own interests."

*course, is transferred and circulates, through several hands, it is conceived that there is a distinction between the time of [*15] presentment necessary as against the original drawer, in the event of the banker's insolvency, and the time necessary to charge the person from whom the check was immediately received. The liability of the drawer cannot, it is apprehended, be enlarged, by circulating the check, and, therefore, in order to charge *him*, if the banker fail, the check, in whose hands soever it be, must be presented within the period within which the payee or first holder must have presented it, but as against the party transferring the check to the holder it is sufficient, whatever be the date of the check, to present it, or forward it for presentment, on the day next after the transfer.

As to the consequences of non-presentment, the circumstances which will be evidence of presentment,*or which will excuse or waive non-presentment, the reader is referred to the Chapter on PRESENTMENT FOR PAYMENT.

Checks being intended for immediate payment, on being presented, are not usually accepted. It has been said, however, that the custom of London bankers, to mark checks as good, is equivalent to acceptance, and binds the banker to pay the checks so marked.(a) And no doubt the mark is an acceptance of which any holder of the check may avail himself, provided the mark amount to a writing within the 1 & 2 Geo. 4, c. 78, s. 2. If it so happen that the drawee of the check is the banker of the holder, as well as of the drawer, no promise by the banker to pay the check will be implied by his receiving the check from the holder without observation, and keeping it till the following day,(b) for *prima facie* he will be taken to have received it as the holder's agent.(c)(1)

(a) Robson v. Bennett, 2 Taunt. 388; and see 2 M. & Rob. 404, note.

(b) Boyd v. Emmerson, 2 Ad. & E. 184, E. C. L. R. vol. 29.

(c) And see Kilsby v. Williams, 5 B. & Al. 816, E. C. L. R. vol. 7, 1 D. & R. 476, S. C.

(1) It is said that a bill of exchange is in theory an assignment to the payee of a debt due from the drawee to the drawer. This is undoubtedly true where the bill has been accepted, whether it be drawn on general funds or a specific fund, and whether the bill be in its own nature negotiable or not; for in such a case, the acceptor, by his assent, binds and appropriates the funds for the use of the payee. In cases also where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee it binds the fund in his hands. But where an order is drawn either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or

It is now a common practice, not only in the City of London but throughout England, to write across the face of a check the name of

give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft; or an obligation to accept may be fairly implied from the custom of trade or the course of business between the parties as a part of their contract. The reason of this principle is plain. A creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons. Per Story, J., in *Mandeville v. Welch*, 5 Wheat. 277. It is to be observed that it is the tacit if not the express understanding between banks and their customers, that they shall have the right to draw for the whole or a part of the funds deposited with them. It might perhaps be inferred that a check duly presented is an appropriation of so much of the drawer's funds in their hands, and that if payment has been stopped, as is sometimes done, they are liable to the holder notwithstanding the drawer may afterwards withdraw his funds. This point does not seem settled. *Chitty on Bills*, 281, 10th Ed. See *Bullard v. Randall*, 1 Gray, 605; *Corser v. Craig*, 1 Wash. C. C. Rep. 424. This last case as applicable to a bill of exchange cannot now be considered as law. A bill of exchange is not an equitable assignment or appropriation, but the cases treat a check on a banker as such; and if the holder is a holder for value, as to whom the drawer cannot revoke rightfully the power which he holds, coupled with an interest, why should not the banker upon distinct claim and notice be held bound by the equity? However this may be, such a result would doubtless follow, where the bank upon presentment of a check marks it *good*. This is equivalent to the acceptance of a bill, and operates an appropriation to that check by the assent of the bank. *Willets v. Phoenix Bank*, 2 Duer, 121. See 2 Story Rep. 502, In the matter of *Brown*. The mere priority however in the drawing of a check gives no preference to the holder over subsequent checks; and it would seem that where several checks are presented at the same time, the bank is not bound to pay one rather than another, where the funds in hand are not sufficient to meet all. *Dykers v. Leather Manufacturing Company*, 11 Paige, 611. The insertion of the word "mem." in a bank check does not affect its negotiability, or the right of the holder to present it to the bank and demand payment immediately; and the bank will be protected in the payment of such checks to the same extent that it would, had not that word been inserted. *Ibid*. See Story on Prom. Notes, § 499.

The holder of a check is not bound to receive part payment thereof, even if the bank is willing to pay in part. He has a claim to the entire sum named therein. On the other hand, the bank is not bound to pay, unless it is in full funds; and it is not obliged to pay or to accept to pay, if it has partial funds only; for it is entitled to the possession of the check on payment; and indeed, in the ordinary course of business, the only voucher of the bank for any payment is the production and receipt of the check, which the holder cannot safely part with unless he receives full payment, nor the bank exact unless under the like circumstances. In the matter of *Brown*,

a banker. The effect of this crossing is to direct the drawees to pay the check only to the banker whose name is written across, and the object of the precaution is to invalidate the payment to a wrongful holder in case of loss. It seems, however, that the holder may erase the name of the banker and substitute that of another banker.^(d) It is also not unusual to write the words, *and Co.*, only, in the first instance, leaving the particular banker's name to be filled up afterwards, so as to *insure the presentment by some banker or other.^(e)

C. drew a check on his banker payable to A. and B., assignees [*16] of C. or bearer, and wrote the name of their banker across it. B., who had another private account with the banker, paid the check into that account; it was held, that the bankers were justified in applying it to that account, the drawer's writing the name of the bankers of the payees of the check across it not being, according to the custom of trade, information to the bankers that the money was the money of the payees.^(f)

A check presented and paid is no evidence of money lent or advanced by the banker to the customer.^(g) On the contrary, it is *prima facie* evidence of the repayment, to the amount of the check, by the banker to the customer, of money previously lodged by the customer in the banker's hands. A check not presented, is not evidence of money previously lent by the drawer to the payee.^(h) In other words, the mere circumstance of one man drawing a check in favor of another is no evidence of a debt due from the drawer.⁽¹⁾

(d) *Stewart v. Lee*, 1 M. & M. 158, E. C. L. R. vol. 22.

(e) *Boddington v. Schlenker*, 4 B. & Ad. 752, E. C. L. R. vol. 24, 1 N. & M. 540, S. C.

(f) *Ibid.*

(g) *Fletcher v. Manning*, 12 M. & W. 571.*

(h) *Pearce v. Davis*, 1 M. & Rob. 365; see *Aubert v. Walsh*, 4 Taunt. 293; *Cary v. Gerrish*, 4 Esp. 9.

2 Story Rep. 519. In a suit against a bank for money deposited with it by the plaintiff, the defendant produced a check upon the bank, which it had paid, for the amount of the money, signed by the plaintiff and payable to the order of Corlies & Co., and with the name of this firm written upon it; it was proved that this was not the indorsement of the firm, and that it never owned or had any interest in the check; held that the plaintiff was entitled to recover. *Morgan v. The Bank of the State of New York*, 1 Kernan, 404.

(1) A check payable to A. B. or bearer, is not evidence of money lent and advanced to A. B. by the drawer of the check. *Flemming's Exrs. v. McClain*, 13 Penna. State Rep. 177; *Baker v. Williamson*, 4 *Ibid.* 469. The presumption is, that it was given in payment of a debt, or that cash was given for it at the time. A check in the hands of the bank or banker upon which it is drawn, is merely *prima facie* evi-

A check, unless dishonored, is payment.(i) But, upon a question whether a debt have been paid, the mere production of a check drawn by the debtor in favor of the creditor and paid by the banker, is no evidence of payment.(k) It must be further shown that the check passed through the creditor's hands. For this purpose it is prudent to cause the payee to write his name across the check or to indorse it.(l) But, it is not necessary to go on and show that the debtor paid the check to the creditor.(m)(1)

When the acceptor or drawee of a bill proposes to pay by a check, the holder should not, in strictness, give up the bill till the check is paid.(n) It has, however, been held that the holder is not guilty of neglect in giving up the bill before the check is paid,(o) but it is believed not to be usual at this day *with London bankers to exchange bills for checks, and it is doubtful whether they would now be protected in so doing. If a creditor, however, in payment of any other debt than a bill or note, take a check, and the banker fail, or the check be dishonored, the creditor's remedies remain entire.(p)(2)

It has been said that the holder of an unpaid check as assignee of

(i) *Pearce v. Davis*, 2 M. & Rob. 365; see *Moore v. Barthrop*, 1 B. & C. 5, E. C. L. R. vol. 8, 2 D. & R. 25, S. C.

(k) *Egg v. Barnett*, 3 Esp. 196; *Pearce v. Davis*, supra; *Lloyd v. Sandilands*, Gow. 15.

(l) *Aubert v. Walsh*, 4 Taunt. 293; *Lloyd v. Sandilands*, Gow. 15.

(m) *Mountford v. Harper*, 16 M. & W. 825; * *Boswell v. Smith*, 5 C. & P. 60, E. C. L. R. vol. 24.

(n) *Marius*, 21; *Ward v. Evans*, 12 Mod. 521; *Vernon v. Boverie*, 2 Show. 296.

(o) *Russell v. Hankey*, 6 T. R. 13; *Ridley v. Blackett*, Peake's Ad. C. 62. *

(p) *Everett v. Collins*, 2 Camp. 515; *Dent v. Dunn*, 3 Camp. 296; *Marsh v. Pedder*, Holt, 72, 4 Camp. 257, S. C.; *Tapley v. Martens*, 8 T. R. 451; *Wyatt v. Marquis of Hertford*, 3 East, 147.

dence of the repayment to the amount of the check by the banker to the customer, of money previously lodged by the customer, in the banker's hands. *The Lancaster Bank v. Woodward*, 18 Penna. State Rep. 361.

(1) A naked check, payable to A. or bearer, is not *per se* evidence of payment to A. It must be proved that he received the money at the bank; and in order to charge him as debtor, evidence of the consideration of the check should be given. *Patton v. Ash*, 7 Serg. & Rawle, 116. See *Cromwell v. Lovett*, 1 Hall, 56, S. C. 6 Wend. 369; *People v. Newell*, 4 Johns. 296; *The People v. Baker*, 20 Wend. 602.

(2) A bank check, until cashed, is no payment. *The People v. Baker*, 20 Wend. 602.

a chose in action, has an equitable claim on the drawee, and in the event of his bankruptcy may prove under the fiat.(q)

It seems that the death of the drawer of a check is a countermand of the banker's authority to pay it. But that if the banker do pay the check before notice of the death, the payment is good.(r)

If the sum for which the customer drew the check be fraudulently altered and increased, and the banker pay the larger sum, he cannot charge his customer with the excess, but must bear the loss.(s) But should any act of the drawer himself have facilitated or given occasion to the forgery, he must bear the loss himself. A customer of a banker, on leaving home, intrusted to his wife several blank forms of checks, signed by himself, and desired her to fill them up according to the exigency of his business. She filled up one with the words *fifty-two pounds two shillings*, beginning the word *fifty* with a small letter in the middle of the line. The figures, 52: 2, were also placed at a considerable distance to the right of the printed £. She gave the check, thus filled up, to her husband's clerk, to get the money. He, before presenting it, inserted the words, "*three hundred*" before the word *fifty*, and the figure 3 between the printed £ and the figures 52: 2, so that it then appeared to be a check for 352: 2. It was presented, and the bankers paid it. Held, that the improper mode of filling up the check had invited the forgery, and therefore, that the loss fell on the customer and not on the banker.(t)

*When a plurality of persons, not being partners in trade, have money in a bank, they must each sign the check. If one [*18] abscond, equity will relieve the others, and assist them to get the money.(u)

It has been not unusual for bankers to enter checks in the pass-book as of the date when they were drawn, and not as of the date when

(q) In Fry and Chapman's bankruptcy, in the year 1829, several holders of checks on the bankrupts claimed to prove, alleging that they were equitable assignees of choses in action. The commissioners took time to consider, and afterwards disallowed the claim.

(r) Tate v. Hilbert, 2 Vesey, Jr. 118.

(s) Hall v. Fuller, 5 B. & C. 750, E. C. L. R. vol. 11, 8 D. & R. 464, S. C.; Smith v. Mercer, 6 Taunt. 76, E. C. L. R. vol. 1, 1 Marsh, 453, S. C.

(t) Young v. Grote, 4 Bing. 253, E. C. L. R. vol. 13, 12 Moore, 484, S. C.

(u) Ex parte Hunter, 2 Rose, 363. See post, Chapter v. on PAYMENT.

they were actually paid, and to calculate interest accordingly. But a banker should debit his customer, not from the date of the check, but from the time of payment.(v)

The 9 & 10 Wm. 3, c. 17, applies only to bills of exchange payable *after date*. Checks, therefore, are not protestable.(w)

A check, like a bill or note, may now, it seems, be referred to the Master to compute principal and interest.(x)

A check cannot be the subject of a *donatio mortis causa*.(y) But if the payee receive the money before the donor's death or before the banker has notice of it, the gift will be good.(z)(1)

A stakeholder who cashes a check deposited with him, is not, if the parties agreed to treat the check as money, guilty of a breach of duty.(a)

As to the title of a man receiving money on an overdue check which had been lost, see the Chapter on TRANSFER.

A check may be taken in execution.(b)

(v) Goodbody v. Foster, Camb. Sum. Ass. 1831, Lyndhurst, C. B.

(w) Grant v. Vaughan, 3 Bur. 1516.

(x) See Bentham v. Lord Chesterfield, 5 Scott, 417.

(y) Tate v. Hilbert, 2 Ves. Jr. 111; Riddell v. Dobree, 1838; 3 Jurist, 722.

(z) Ibid.

(a) Wilkinson v. Godefroy, 9 Ad. & E. 536, E. C. L. R. vol. 36.

(b) 1 & 2 Vict. c. 110, s. 12.

(1) That is, a check drawn by the donor himself. A draft is not the subject of a *donatio mortis causa* by the drawer, when it has not been accepted by the drawee. Harris v. Clark, 2 Barb. Sup. Ct. Rep. 94. The delivery of any instrument which operates as an assignment to the donee of the funds of the donor, in the hands of a third person, would, *it seems*, constitute a valid gift, *causa mortis*. But the delivery to the donee of a draft by the donor, upon a third person, who is in possession of his funds, does not so operate as an assignment of a sum mentioned therein, until the draft has been accepted, and therefore does not constitute a valid *donatio causa mortis*. Harris v. Clark, 3 Comstock, 93. As to the analogous cases of promissory notes, see p. 136 post, note.

*CHAPTER IV.

[*19]

OF AN I. O. U.

WHAT IT IS, 19	NEED NOT BE ADDRESSED, 20
REQUIRES NO STAMP, 19	BILL IN EQUITY TO DISCOVER CONSI-
UNLESS IT AMOUNT TO A NOTE OR	DERATION, 20
AGREEMENT, 20	TO RESTRAIN AN ACTION, 20

A MERE acknowledgment of a debt does not amount to a promissory note.(1)

Such an acknowledgment is frequently made in an abbreviated form, thus :

London, 1st January, 1846.

Mr. A. B.

I. O. U. 100.

C. D.

An acknowledgment of a debt in this form is called an I. O. U. It is evidence of an account stated, but not of money lent.(a)

Not amounting to a promissory note, and being merely evidence of a debt due by virtue of some antecedent contract, it requires no stamp.(b) Nor indeed is a stamp required for any instrument which is merely an acknowledgment of money deposited to be accounted

(a) *Fesenmayer v. Adcock*, 16 M. & W. 449.*

(b) *Fisher v. Leslie*, 1 Esp. 425 ; *Israel v. Israel*, 1 Camp. 499 ; *Childers v. Boulnois*, D. & R. N. P. Ca. 8 ; *Beeching v. Westbrook*, 8 M. & W. 412.*

(1) That a due bill is a promissory note, see *Cummings v. Freeman*, 2 Humph. 143 ; *Finney v. Shirley*, 7 Missouri, 42 ; *McGowen v. West*, Ibid. 569 ; *Harrow v. Dugan*, 6 Dana, 341 ; *Marrigan v. Page*, 4 Humph. 247.

A written acknowledgment of indebtedness in a certain sum to a certain person, with a statement of the consideration, is a promissory note. *Fleming v. Burge*, 6 Alabama, 373.

The plaintiff declared on the following instrument, signed by the defendant:—"This is to certify, that I did, in the year 1844, purchase of A. his tan-yard and stock, for which I did promise to pay B., for the benefit of A., four hundred and seventy-five dollars ; which amount I do hereby acknowledge to be unpaid, and yet due ; and one note of hand for fifty-three dollars and fifty cents, which note is said to be lost or mislaid, each amount bearing interest from January 1, 1845 ;"—held that the foregoing instrument, in legal contemplation, was a due bill, and might be declared on as a promissory note. *Lowe v. Murphy*, 9 Georgia, 338.

for, and not a receipt for money antecedently due.(c) Therefore a paper stating that the party signing it had certain bills in his hands which he held to get discounted or returned on demand, requires no stamp.(d)

[*20] *But if the I. O. U. contain an agreement that it is to be paid on a given day it will be a promissory note, and must be stamped as such. And if the contracting words be such as to make it not a promissory note, but an agreement, it must be stamped accordingly,(e) unless it be under 20*l.* in amount.(f)

The following instrument was held to be a mere I. O. U., not to be a promissory note, and to require no stamp: "1839, Nov. 11, I. O. U. forty pounds thirteen shillings, which I borrowed of Mrs. Melanotte, and to pay her five per cent. till paid."(g) An instrument in this form, "I. O. Mr. John Gould the sum of 200*l.* for value received," requires no stamp.(h)

It is conceived that a mere I. O. U., given by a surety for the debt of another man, is void by the Statute of Frauds.(i)

An I. O. U. ought regularly to be addressed to the creditor by name; but though not addressed to any one it will be evidence for the plaintiff, if produced by him.(k) This rule is convenient and safe. For if the I. O. U. were given (as it often is) when no one but the plaintiff and defendant were present, it would be impossible for the plaintiff to prove how he became possessed of it, but if the I. O. U. were given to a third party, the defendant has ordinarily the means of proving it.

(c) *Tomkins v. Ashby*, 6 B. & C. 541, E. C. L. R. vol. 13, 9 D. & R. 543, 1 M. & M. 32, S. C.; *Casborne v. Dutton*, Selwyn's N. P. 381, 9th ed.; *Payne v. Jenkins*, 4 C. & P. 324, E. C. L. R. vol. 19.

(d) *Mullett v. Hutchison*, 3 C. & P. 92, E. C. L. R. vol. 14, 7 B. & C. 639, E. C. L. R. vol. 14, S. C.; *Langdon v. Wilson*, 2 Man. & R. 10, E. C. L. R. vol. 17; *Williamson v. Bennett*, 2 Camp. 417; *Horne v. Redfearne*, 4 Bing. N. Ca. 433, E. C. L. R. vol. 33, 6 Scott, 260, S. C. (e) *Brooks v. Elkins*, 2 M. & W. 74.*

(f) *Evans v. Phillpotts*, 9 C. & P. 270, E. C. L. R. vol. 38.

(g) *Melanotte, Adm. v. Teasdale*, 13 M. & W. 216.*

(h) *Gould v. Coombs*, 14 L. J. 175, C. P., 1 C. B. Rep. 543, E. C. L. R. vol. 50, S. C.

(i) So held by the Court of Exchequer, in 1845. Admitted by counsel to be so. And see *Gould v. Coombs*, 14 L. J. 175, C. P., 1 C. B. Rep. 550, E. C. L. R. vol. 50.

(k) *Curtis v. Rickards*, 1 M. & G. 46, E. C. L. R. vol. 39, 1 Scott, N. R. 155; *Douglas v. Holme*, 12 Ad. & E. 641, E. C. L. R. vol. 40; *Fisher v. Leslie*, 1 Esp. 427; *Fesenmayer v. Adcock*, 16 M. & W. 449.*

It has been held that a bill in equity will lie to discover whether an I. O. U. were given for a gaming debt.(l)

The Court will not restrain an action on an I. O. U. given partly for money lent to play at games of chance not illegal in Germany, and partly for money won at cards not exceeding 10*l.* at a time.(m)

*CHAPTER V.

[*21]

OF THE CAPACITY OF CONTRACTING PARTIES TO A BILL OR NOTE.

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(l) *Wilkinson v. L'Eaugier*, 2 *Younge & Collyer*, 366.*

(m) *Quarrier v. Colston*, 12 *L. J.* 57, Ch.; 6 *Jurist*, 959.

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[*22] *WHATEVER a man may do by himself (except in virtue of a delegated authority), he may do by his agent.(a)

Disqualifications for contracting on a person's own account are not disqualifications for contracting as an agent for another; for an agent is considered as a mere instrument. Therefore, infants,(b) married women, persons attainted, outlawed, or excommunicated, aliens, and other persons laboring under disabilities, may be agents.(c)(1)

No particular form of appointment is necessary to enable an agent to draw, accept, or indorse bills, so as to charge his principal. He may be specially appointed for this purpose, or may derive his power from some general or implied authority.(2)

Subsequent recognition of an agent's acts is equivalent to previous authority; provided the agent, when he acted, assumed to act as agent.(d)

General authorities to transact business, and to receive and dis-

(a) Coombe's case, 9 Co. 75.

(b) But an infant though he may be a private, cannot be a public attorney; that is, an attorney at law to conduct suits. Mirror, c. 2, s. 21; Co. Litt. 128, a.

(c) Co. Litt. 52, a.

(d) Viner's Ab. Ratihibition; Saunderson v. Griffiths, 5 B. & C. 909, E. C. L. R. vol. 11, 8 D. & R. 643; Vere v. Ashby, 10 B. & C. 288, E. C. L. R. vol. 21. See the law of Ratihibition, discussed in Wilson v. Tumman, 6 Man. & G. 236, E. C. L. R. vol. 46.

(1) A slave may be an agent. The Governor v. Daily, 14 Alabama, 469.

(2) The authority of an agent to transfer a note by indorsement may be created verbally, whether the principal be an individual or a corporation. And such authority may be inferred from facts and circumstances connected with the transaction. Trundy v. Farrar, 32 Maine, 225.

charge debts, do not confer upon an agent the power of accepting or indorsing bills, so as to charge his principal.(e)(1) And special authorities to accept or indorse are construed strictly.(2) A. B., who

(e) Hogg v. Snaith, 1 Taunt. 347, and Hay v. Goldsmid, there cited; Murray v. East India Company, 5 B. & Al. 204, E. C. L. R. vol. 7; and see Howard v. Baillie, 2 H. Bla. 618; Gardner v. Bailie, 6 T. R. 591; Kilgour v. Finlyson, 1 H. Bla. 155; Hay v. Goldsmid, 2 Smith's Rep. 79; Esdaile v. Lanauze, 1 Y. & Col. 394.*

(1) Verbal authority from the principal to his agent to transact all his business confers the power to assign and transfer negotiable papers. 1 Swan (Tenn.), 205.

(2) Whether an agent has power to draw or indorse bills or notes, will depend upon the construction of the words used in his appointment. When certain special objects are enumerated, subsequent general words will be restrained to these objects. Thus a power of attorney to collect debts, to execute deeds of lands, to accomplish a complete adjustment of all concerns of the constituent in a particular place, and to do all other acts which the constituent could do in person, does not authorize the giving of a note by the attorney in the name of the principal. Rossiter v. Rossiter, 8 Wendell, 494. The power will be limited by the general objects and purposes for which it is conferred. The appointment of an attorney by writing "with full power and authority for me, and in my name, to draw or to indorse promissory notes, to accept, draw, or indorse bills of exchange," does not authorize the attorney to draw or indorse notes for the mere accommodation of third persons. The general intention was, that the attorney should transact the business which it particularizes *for the constituent and in his name*: and this intent can only be upheld by limiting the authority of the attorney to cases in which he acts on account of his principal. Wallace v. The Branch Bank at Mobile, 1 Alabama, 565; Kingsley v. The Bank of the State, 3 Yerger, 107. A power of attorney to execute promissory notes for discount at a bank to a certain amount, does not authorize the renewal of said notes. Ward v. The Bank of Kentucky, 7 Monroe, 93. A power to B. to sign and indorse notes at a bank, gives B. authority to sign and indorse any note payable at and due to that bank, and no other. Morrison v. Taylor, 6 Monroe, 82. Where the agent of a manufacturing company was authorized, by a vote of the directors, to raise money for his own use upon the credit of the company, and to give therefore a "company note;" it was held that the terms "company note" were not used in the vote to designate a technical promissory note, and that a bill of exchange drawn by the agent in the name of the company, upon the dishonor of which by statute they could not be liable for any damages, was a company note within the meaning of the vote. The law, however, is very clear, that the party giving the authority may limit it precisely, and even arbitrarily; and it is not enough to say that the security given is not more onerous than the one authorized. Tripp v. Swansey Manuf. Co., 13 Pick. 291. A supercargo cannot bind his principals as acceptors of a bill drawn by himself, without express authority to that effect communicated to and relied on by the person who receives the bill. Scott v. McLellan, 2 Greenleaf, 199. If a party originally authorizing his name to be subscribed to a note or participating in the consideration, ratifies the act of another in putting his name thereto, he becomes liable as the

carried on business on his own account, and also in partnership, went abroad, and gave to certain persons in this country two powers of attorney; by the first of which, authority was given for him, and his name, and to his use, to do certain specific acts (and amongst others, to indorse bills, &c.), and generally to act for him, as he might do if he were present; and, by the second, authority was given, "for him and on his behalf, to accept bills drawn on him by his agents or correspondents." C. D., one of A. B.'s partners (and who acted as his agent), in order to raise money for payment of the creditors of the joint concern, drew a bill, which the attorney accepted in A. B.'s name by procuration. In an action against A. B. by the indorsee of the bill, held, first, that the right of the indorsee depended upon the authority given to the attorney; secondly, that the power applied [*23] only to *A. B.'s individual, and not to his partnership affairs; thirdly, that the special power to accept extended only to bills drawn by an agent in that capacity, and that C. D. did not draw the bills in question as agent, but as partner; and lastly, that the general words in the power of attorney were not to be construed at large, but as giving general powers for the carrying into effect the special purposes for which they were given.^(f) An authority to indorse bills remitted to the principal, gives no power to indorse a bill which the principal could not have indorsed without a fraud, although the bill get into the hands of a bona fide holder, for value without notice.^(g) It would have been otherwise had the principal himself indorsed.^(h)

^(f) *Attwood v. Munnings*, 7 B. & C. 278, E. C. L. R. vol. 14, 1 Man. & R. 78.

^(g) *Fearn v. Filica*, 14 L. J. 15, C. P., 7 M. & G. 513, E. C. L. R. vol. 49, S. C.

^(h) *Ibid.*

maker of the note. *Walter v. Trustees of Schools*, 12 Illinois, 63. If one promise to pay a note, to which his name has been signed by one assuming, without authority, to act as his agent, it is in law equivalent to an antecedent authority to execute the note. *Bigelow v. Denison*, 23 Verm. 564.

It is to be observed that, although, as stated in the text, ratification is in general equivalent to antecedent authority, yet it has been decided, that where the drawer of a note affixes his signature as the agent of another, if in an action against him personally, he claims to have had authority to sign as he did, he is bound to show such authority existing at the time of the making of the note, and is not permitted to show a subsequent ratification by his principal; such ratification would avail to render the principal liable, but not to relieve the agent from the personal liability once incurred by giving the note. The note when executed was either the note of the one or the other—if it was not then the note of the principal, it was the note of the attorney. *Rossiter v. Rossiter*, 8 Wendell, 494.

The words "*per procuration*" are an express intimation of a special and limited authority. And a person who takes a bill so drawn, accepted, or indorsed, is bound to inquire into the extent of the authority.(i)

An authority is often implied from circumstances; as if the agent has formerly been in the habit of drawing, accepting, or indorsing for his principal, and his principal has recognized his acts. Thus, to an action against an acceptor of a bill, the defence was, that the drawer had forged the acceptor's signature, in answer to which it was proved that the defendant had previously paid such acceptances; and this was held proof of authority to the drawer.(k)

"It may be admitted," says Tindal, C. J., "that an authority to draw does not import in itself an authority to indorse bills; but still the evidence of such authority to draw is not to be withheld from the jury, where they are to determine on the whole of the evidence, whether an authority to indorse existed or not."(l) And therefore, from the facts that the defendants' confidential clerk had been accustomed to draw checks for them, that *in one instance* they had authorized him to indorse, and in two other instances had received money obtained by his indorsing in their name, a jury was held warranted in inferring that the clerk had a general authority to indorse.(l)

The acceptance of a bill drawn by procuration *is an admission of the agent's authority *to draw*, but no admission of his authority to indorse, though the indorsement were on the bill at the time of acceptance.(m) [^{*24}]

An agent, who exceeds his authority in negotiating a bill, cannot, in any case, convey a title to it, if overdue at the time; and a party who takes a bill from an agent under such circumstances that his title is affected by the wrongful act of the agent, is liable to refund to the principal, money which he may receive in discharge of the bill from the previous parties; or, if in lieu of money, he take a substituted

(i) *Alexander v. McKenzie*, 6 C. B. Rep. 766, E. C. L. R. vol. 60, 18 L. J. 94, C. P., S. C.

(k) *Barber v. Gingell*, 3 Esp. 60; *Lewellyn v. Winckworth*, 13 M. & W. 598; **Cash v. Taylor, Lloyd and Welby's Mercantile Cases*, 178.

(l) *Prescott v. Flinn*, 9 Bing. 19, E. C. L. R. vol. 23, 2 Moo. & Sc. 22, S. C.

(m) *Robinson v. Yarrow*, 7 Taunt. 455, E. C. L. R. vol. 2, 1 Moo. 150. See the Chap. on *Acceptance*.

bill, such second bill belongs to the principal, and the principal may countermand payment. For neither in the first bill, nor in the fruit of it, the second bill, or in money received on either, has he any greater interest than his indorser could convey, viz. the interest of an agent, and a principal has a right to countermand payment to his agent.(n)

If an agent indorse, without authority, a bill payable only to order, such indorsement conveys no right of action, except against the party indorsing.(o)

But the unauthorized delivery of bills or notes payable to bearer, gives a bona fide holder a claim on the other parties.(p)

But in any case, if the transferee know that the transferrer has no right to pass the bills, he can acquire no property in them. Thus, where the plaintiff indorsed bills to A. B. specially in this form, "Pay A. B. or order, for account of plaintiffs," and A. B. pledged the bills with defendant for his private debt, it was held that the defendant took them with sufficient notice that they did not belong to A. B., and that defendant was liable to plaintiffs in action of trover.(q)

An agent who receives a bill for the purpose of getting it discounted, has no right to pawn it for a sum smaller than the amount of the bill, minus the discount, for his employer may, by the pawnee's detention of the bill, or by his change of residence, or by its future negotiation, be prevented from raising on the bill its full value, and yet [*25] be exposed to pay its full amount to *a subsequent bona fide holder.

An agent, or bill broker, intrusted to discount, has no right to pledge the bill as a security for money previously due from himself.(r) And it is very doubtful whether a usage entitling him to do so, would be legal.(s) Prima facie, a bill broker has no right to pledge the bills of his different customers in one mass, for that might subject a

(n) *Lee v. Zagury*, 8 Taunt. 114, E. C. L. R. vol. 4; 1 Moo. 556.

(o) See *Fearn v. Filica*, 7 M. & G. 513, E. C. L. R. vol. 49; 14 L. J. 15, C. P., S. C.

(p) *Bayley*, 106; *Miller v. Race*, 1 Burr. 452; *Lawson v. Weston*, 4 Esp. 56. See Chap. xi. on *Transfer*.

(q) *Treuttell v. Barandon*, 8 Taunt. 100, E. C. L. R., vol. 4; 1 Moo. 543, S. C. See the subject of restrictive indorsement more fully treated in the Chapter on *Transfer*.

(r) *Haynes v. Foster*, 2 C. & M. 237.*

(s) *Foster v. Pearson*, 1 C. M. & R. 849; * 5 Tyr. 255, S. C.

bill to lien beyond the amount advanced upon it.(t) But the usage of a particular district may enlarge the authority of a bill broker, and give him a right to pledge the bills of different customers in one mass.(u) Such is the usage of bill brokers in the City of London, and it is not an unreasonable one, for although it may occasionally be attended with inconvenience, yet on the other hand, the bill broker may often raise money on a large scale on better terms than on a small one, or discount with other bills, bills which alone could not be discounted at all.(v)

If an offer to accept be made by an agent, the holder may and should require the production of his authority, and, if satisfactory authority be not produced, may treat the bill as dishonored. "A person taking an acceptance importing to be by procuration," says Mr. Justice Bayley, "ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority."(w) It has been doubted whether, in any case, a holder is bound to acquiesce in an acceptance by an agent, on the same principle that it has been held that a purchaser is not bound to accept a conveyance to be executed by a power of attorney, viz. : that it will multiply the proofs necessary to sustain his title.(x)

The authority of an agent will be presumed to continue till due notice of its revocation has been given; and such notice should be, as to strangers, by publication in the *Gazette*; and as to customers [*26] and correspondents, by express individual *communication.(y)

* A mere agent cannot delegate his authority, unless specially authorized so to do.(z)(1)

(t) *Haynes v. Foster*, 2 C. & M. 237.*

(u) *Foster v. Pearson*, 1 C. M. & R. 849; * 5 Tyr. 255, S. C.

(v) "A bill broker is not a person known to the law with certain prescribed duties, but his employment is one which depends entirely on the course of dealing." *Ibid.* *Foster v. Pearson*, 1 C. M. & R. 849.*

(w) *Attwood v. Munnings*, 7 B. & C. 278, E. C. L. R. vol. 14; 1 Man. & R. 78.*

(x) See *Coore v. Callaway*, 1 Esp. 115; *Chitty*, 283.

(y) See *Newsome v. Coles*, 2 Camp. 617.

(z) *Coombe's case*, 9 Coke, 75; *Palliser v. Ord*, Bunb. 166. But an authority to indorse, may imply an authority to indorse by the hand of another in the agent's presence. *Lord v. Hall*, 9 L. J. 147, C. P.; see also *Ex parte Sutton*, 2 Cox, 84.

(1) An agent with power to give notes cannot delegate that power. *Brewster v. Hobart*, 15 Pick. 302; *Emerson v. Providence Manufacturing Co.* 12 Mass. 237.

An agent will be personally liable on his drawing, indorsing, or accepting, unless he either sign his principal's name only, or expressly state in writing his ministerial character; "unless," to use the words of Lord Ellenborough,^(a) "he states upon the face of the bill that he subscribes it for another; unless he says plainly, 'I am the mere scribe.'"

Thus, where the defendant, agent of a banker, drew the following bill, "Pay to the order of A. B. 50*l.*, value received, which place to the account of the Durham Bank, as advised," and subscribed his own name, it was held that the defendant was personally answerable, and he alone, though the plaintiff, the payee, knew that he was only agent.^(b) So if a broker draws upon the buyer of goods which he has sold for his principal in favor of the latter, to whom he indorses the bill, he is liable, as drawer, to his principal.^(c) A bill for 200*l.* was drawn upon the defendant by the description of "Mr. H. Bishop, *Cashier of the York Buildings Company, at their house in Winchester Street, London;*" and the bill directed him to place the 200*l.* to the account of the company. The letter of advice from the drawer of the bill was sent to the company, and by their direction the defendant accepted it, in this form, "Accepted, 13 June, 1732, per H. Bishop." He was held responsible, the Court considering the addition to his name as merely descriptive, the order to place the sum to the account of the company as a direction how to reimburse himself, and the letter of advice inadmissible to superadd to the terms of the bill, as against the plaintiff, an indorsee.^(d)(1)

The rule of law as to simple contracts in writing, other than bills and notes, is, that parol evidence is admissible to charge unnamed

(a) *Leadbitter v. Farrow*, 5 M. & Sel. 345; *Sowerby v. Butcher*, 2 C. & M. 368; *4 Tyr. 320, S. C.

(b) *Ibid.*; *Goupy v. Harden*, 7 Taunt. 160, E. C. L. R. vol. 2; 2 Marsh. 454.

(c) *Lefevre v. Lloyd*, 5 Taunt. 749, E. C. L. R. vol. 1; 1 Marsh. 318.

(d) *Thomas v. Bishop*, 2 Stra. 955; *Rew v. Pettet*, 1 Ad. & E. 196, E. C. L. R. vol. 28, 3 Nev. & M. 456, S. C., nom. *Crew v. Pettet*, ante. As to agent's remedy, see *Huntley v. Sanderson*, 3 Tyr. 469, 1 C. & M. 467, *S. C.

(1) An officer of a corporation, to whose order, as such, a note executed to it is payable, and who indorses the note, adding to his name his official character, and who indorses it in behalf of the corporation, is not personally responsible as indorsee. *Babcock v. Beman*, 1 Kernan, 200.

principals, and so it is to give them the benefit of *the con- [*27] tract;(e) but is inadmissible for the purpose of discharging the agent who signs in his own name. In the two former cases the evidence is consistent with the instrument, for it admits the agent to be entitled or bound by it, but in the latter case it is inconsistent with the terms of it.(f) But it is conceived that the law as to negotiable instruments is in one respect different, and that where the principal's name does not appear, he is not liable on a bill or note.(g)(1)

(e) As to the cases in which a man who signs himself agent may come forward and sue as principal, see *Bickerton v. Burrell*, 5 M. & S. 383, and *Rayner v. Grote*, 16 L. & J. Ex. 82; 15 M. & W. 359,* S. C.

(f) *Higgins v. Senior*, 8 M. & W. 834.*

(g) See an American case, *Story on Agency*, 125, n., and the observations of Lord Ellenborough and Mr. J. Holroyd, in *Leadbitter v. Farrow*, 5 M. & S. 349; *Bult v. Morrell*, 12 Ad. & E. 750, E. C. L. R. vol. 40. But see *Lindus v. Bradwell*, 5 C. B. Rep. 583, E. C. L. R. vol. 57, where a bill drawn on the principal, accepted by the agent in the agent's name, was held binding on the acceptor.

(1) Deeds by an agent or attorney must be executed in the name of the principal to bind him, but it is otherwise in case of simple contracts. *New England Marine Ins. Co. v. De Wolf*, 8 Pick. 56. In contracts not under seal, if the agent intend to bind his principal and not himself, it will be sufficient if it appear in such contract that he acts *as agent*. *Andrews v. Estes et al.* 2 Fairfield, 267; *Shotwell v. McKown*, 2 Southard, 828. It is not sufficient to charge the principal or protect the agent from personal responsibility, merely to describe himself as agent, if the language of the instrument imports a personal contract on his part. But when the name of the principal appears on the face of the instrument or contract, and it is evident that the agent did not intend to bind himself personally, but acted merely on behalf of the principal, if he acted by competent authority, the principal and not the agent will be bound. *Pentz v. Stanton*, 10 Wendell, 271. It will of course be remembered that the above case respects the liability of the principal *on the bill as such*,—for a principal is liable on his agent's contracts for him whether his name was disclosed or not—unless, the principal being known, credit was exclusively given to the agent,—in an action founded on the original consideration. *Ibid.* A note signed by the authorized agents of a corporation, with words annexed to their names intimating their agency, is the note of the corporation and not of the person signing it. *Johnson v. Smith*, 21 Conn. 627.

A promissory note was subscribed thus, "Pro W. G., J. S. C.;" it was holden to be the note of W. G., if J. S. C. had authority. *Long v. Colburn*, 11 Mass. 97; and see *Emerson v. Providence Man. Co.*, 12 Mass. 237; *Rice v. Gove*, 22 Pick. 158; *Robertson v. Pope*, 1 Richardson, 501; *Orfult v. Ayres*, 7 Monroe, 356; *McBean v. Morrison*, 1 A. K. Marshall, 545. When one gives a promissory note as guardian for a minor, although it is so stated in the body of the note, he is personally liable. *Forster v. Fuller*, 6 Mass. 58. As an administrator cannot by his promise bind the estate of the intestate, so neither can the guardian by his contract bind the person or estate of his ward. *Ibid.*

When individuals subscribe their proper names to a promissory note, *prima facie*

If an agent, having no authority so to do, write, without a fraudulent intent, another man's name as acceptor of a bill, that is a fraud in law for which such agent is responsible, even to a subsequent indorsee; *(h)* but no one can be liable *as acceptor* but the real drawee, unless he be acceptor for honor. And where a man assuming to act as agent is really not so, in consequence of a revocation, by the death of his principal unknown to the agent, so that there is no fault in the agent, the agent is not liable, *(i)* nor the executors of the deceased principal. *(k)* *(1)*

The proper mode for an agent to indorse, so as to avoid personal responsibility, is by adding the words, *sans recours*, or *without recourse to me.* *(l)*

(h) Polhill v. Walter, 3 B. & Ad. 114, E. C. L. R. vol. 23; L. J. 92, K. B. If he had signed the *drawer's* name without authority, quære, whether he would not have been personally liable *on the bill as drawer*. Wilson v. Barthrop, 2 Mees. & Wels. 863.*

(i) Smout v. Ilberry, 10 Mees. & Wels. 1.*

(k) Blades v. Free, 9 B. & C. 167, E. C. L. R. vol. 17.

(l) Vide post, Chap. vi.

they are personally liable, though they add a description of the character in which the note is given; but such presumption of liability may be rebutted, as between the original parties, by proof that the note was in fact given by the makers as agents with the payee's knowledge. Brockway v. Allen, 17 Wendell, 40; Webb v. Burke, 5 B. Monroe, 51; Hovey v. Magill, 2 Conn. 680; and see Hills v. Bannister, 8 Cowen, 31; Fogg v. Virgin, 19 Maine, 352; Pomeroy v. Slade, 16 Vermont, 220; Packard v. Nye, 2 Metcalf, 47; Fitch v. Lawton, 6 Howard (Miss.), 371; Rupert v. Madder, 1 Chandler, 146; Collins v. Johnson, 16 Georgia, 458.

If one draws a bill in his own name, without stating that he acts as agent, unless when acting for the government, he is personally liable, although he directs it to be paid out of a particular fund, and although the person in whose favor it is drawn, knows the drawer to be but an agent. Newhall v. Dunlap, 14 Maine, 180; Snow v. Goodrich, Ibid. 235. A public agent is not answerable personally for any contract made by him in his official capacity, unless he specially binds himself to be personally responsible. Tucker v. The Justices, 13 Iredell, 434. The weight of authority is that a factor, who indorses generally the bills which he remits, renders himself personally liable upon his indorsement to his principal as well as to third persons. Kenback Brothers v. Mollman, 2 Duer, 227.

(1) If a person assumes to act as the agent of another, and acts without authority or exceeds his powers, he binds himself. Keenan v. Harrod, 2 Maryland Ch. Dec. 63. An agent, who exceeds his authority as such, in signing a note, which purports to express the promise of his principal, is not personally liable thereon. Jeffs v. York, 4 Cushing, 371. In case of a defective power to bind the principal, if the agent speaks only in the language of the principal, and does not use apt language to bind himself, he will not be liable on the contract, but may be subjected to an action for a false assumption of authority. Johnson v. Smith, 21 Conn. 627.

If a man holds a bill or note as agent for another, and the circumstances be such that the principal cannot recover, the infirmity of the principal's title infects the agent's title, and the agent cannot recover. *M. and Co.*, residing at Middleburgh, remitted to the plaintiff, in London, a Bank of England note for 500*l.*, informing him that they should draw upon him for the amount at some future period. The plaintiff presented it for payment, but the Bank detained it on the ground that it had been obtained by means of a forged draft from a previous holder. *In trover by the plaintiff it was held, that the plaintiff [*28] was identified with his principals, and that, as there was no evidence of their having given full value for it, he could not recover.^(m) So where *O. and Co.*, in Paris, being indebted to the plaintiff, in London, to the amount of 1300*l.*, remitted to him a Bank of England note for 500*l.*, and the Bank detained it, because it had been stolen some time before, it was held in trover by the plaintiff against the Bank, that though the plaintiff had a demand on *O. and Co.*, for more than the amount of the note at the time when he received it, yet, as no farther advances had been made or credit given by him on account of the note, he must be considered as their agent, and prove that his principals, *O. and Co.*, gave full value for it.⁽ⁿ⁾ From this case, it seems to follow, as a general rule, that wherever a bill or note, payable on demand, is remitted to a creditor in liquidation of an existing debt only, and no fresh credit is given, or advances made by the creditor on the faith of the instrument, he may be treated by the parties liable on it as the agent of the debtor from whom he received it. A doctrine which, while it cannot injure the creditor (for if he cannot recover, he is but where he was before he received the remittance) will tend to prevent gratuitous, fraudulent, or felonious holders of paper from obtaining its value by paying it away to their creditors.^(o)(1)

^(m) *Solomons v. The Bank of England*, 13 East, 135 ; 1 Rose, 99, S. C.

⁽ⁿ⁾ *De la Chaumette v. the Bank of England*, 9 B. & C. 208, E. C. L. R. vol. 17.

^(o) This doctrine was much discussed in the case of *Kinnersley v. Somers*, Exch. M. T. 1832, in relation to Serjeant Onslow's Act, 58 Geo. 3, c. 93. The Court appeared inclined to support the rule deducible from *De la Chaumette v. Bank of England*, but no judgment was given, and the case was, I believe, afterwards settled. But see *Perceval v. Framplin*, Dow. 750 ; *Foster v. Pearson*, 1 C. M. & R. 849 ; * 5 Tyr. 255, S. C. It is to be recollected that a bill or note, payable at a future day, suspends till its maturity the remedy for the antecedent debt. There may, therefore, in this respect be a difference between an instrument payable on demand, and one payable at a future day.

(1) According to the New York Courts, and those of some other States, one who takes a bill or note for a pre-existing debt, takes it subject to all the equities between

An agent who fraudulently negotiates or deposits bills, is guilty of a misdemeanor, under the 7 & 8 Geo. 4, c. 29, and is punishable with fourteen years' transportation.

the original parties. The leading case, and that by which the doctrine has become known, is *Coddington v. Bay*, 20 Johns. 637. The grounds of the determination may be briefly given, in the words of C. J. Spencer: "We are called upon to establish a new principle, or rather to ascertain a principle from decisions in cases as nearly analogous as can be found. In the cases of *Miller v. Race*, 1 Burr, 452; *Grant v. Vaughan*, 3 Burr. 1516, and 1 Bl. Rep. 485, and *Peacock v. Rhodes*, Dougl. 633, the Court lay stress on the fact, that the holder came by the notes for a full and valuable consideration, by giving money, or money and goods, for them, in the usual course of trade; and I consider the real principle to be this, that the person passing the notes, from the fact of his having possession, was the ostensible owner of them, and that the holder having in the usual course of business, given credit to these appearances, which he was justified in doing, has been induced to part with his money or property bona fide; and that, as between him and the real owner there must be a loss on the one side or the other, the law will not divest him of fruits he has honestly acquired, without the possibility of remuneration. In other words, the equities of the parties being equal, the law leaves him in possession, who already has it. But how are the equities here? The respondent was clearly and justly entitled to the proceeds of the sale of the vessel, the notes in question; his agents and trustees were guilty of a grossly fraudulent abuse of their trust, in attempting to deprive him of these notes. Admit that the appellants came to the possession of them without any knowledge of the fraud in passing the notes, how is their situation altered, or what equities have they as against the respondent? If they have to account for these notes, their situation is exactly as it would have been, had the notes not have been transferred to them; merely having had the good fortune to get the notes, without any new consideration or renouncing any lien, their equity to hold the notes, bears no comparison with that of the respondent to demand them. It was suggested that they might have had the benefit of some other security, had they not taken these notes; but of this there is no proof or possibility." See also *Wardell v. Howell*, 9 Wendell, 170; *Rosa v. Brotherton*, 10 Wendell, 85; *Briggs v. Rockwell*, 11 Wendell, 504; *Hart v. Palmer*, 12 Wendell, 523; *Root v. French*, 13 Wendell, 570; *Payne v. Cutler*, Ibid. 605; *Morton v. Rogers*, 14 Wendell, 575; *Dickerson v. Tillinghast*, 4 Paige, 205; *Fulton Bank v. Phoenix Bank*, 1 Hall, 562; *Manhattan Company v. Reynolds*, 2 Hill, 140. It is confined, however, to the case where the note is taken as collateral security only, and not in payment or satisfaction of the pre-existing debt. *Bank of St. Alban's v. Gilliland*, 23 Wendell, 31; *Bank of Sandusky v. Scoville*, 24 Wendell, 115; *Mohawk Bank v. Corey*, 1 Hill, 513; *Norton v. Waite*, 2 Appleton, 175; *Riley v. Anderson*, 2 McLean, 589; *Bertrand v. Barkman*, 8 English, 150; *Young v. Lee*, 18 Barbour's S. C. Rep. 187.

In Pennsylvania, though recognizing the general principle, that one to whom a negotiable instrument has been indorsed as collateral security for a pre-existing debt, who has given no other consideration for it, is not a holder for value: *Petrie v. Clarke*, 11 Serg. & Rawle, 377; *Walker v. Geisse*, 4 Wharton, 252; *Depeau v. Waddington*, 6 Ibid. 220; and the maker, it is said, may aver any ground of defence against the indorsee of such a note which would have been competent against the

If an agent, employed to present a bill, fails to make a due presentment, or to give due notice of dishonor, he is liable to an action

original payee : *Kirkpatrick v. Muirhead*, 16 Penna. State Rep. 117, yet the maker of an accommodation note cannot set up the want of consideration as a defence against it in the hands of a third person, though it be there as a collateral security merely. He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend, must abide the consequence : *Walker v. The Bank of Montgomery County*, 12 Serg. & Rawle, 382 ; and has no more right to complain, if his friend accommodates himself by pledging it for an old debt, than if he had used it in any other way. *Appleton v. Donaldson*, 3 Penna. State Rep. 381. Accommodation paper is the loan of the maker's credit without restriction as to the manner of its use. *Lord v. Ocean Bank*, 20 Penna. State Rep. 384 ; per Black C. J.

Where a note is taken in payment of a debt due and secured by indorsement of a third person, which last note is given up and discharged, it is taken "in a due course of trade." *Nichol v. Bate*, 10 Yerger, 429.

One to whom a promissory note has been transferred before due, as collateral security for indorsements to be made by him, which are afterwards made, and who takes it without notice of a defence existing against it in the hands of the person from whom he received it, is entitled to be treated as a bona fide holder in the commercial sense. Such holder, however, cannot recover upon the note when it is not available as between the original parties, beyond what is due on the indorsements against which it was designed to secure him. *Williams Ex. v. Smith*, 2 Hill, 301.

In *Brush v. Williams*, 11 Connecticut, 388, C. J. Williams, after a learned and elaborate review of all the authorities, maintains, that such a transfer, as security for a pre-existing debt, ought to invest the transferee with all the rights of a bona fide holder for value in the regular course of trade. In Pennsylvania, it has been held, as already stated, that although the taking of the note of a third person as collateral security for a pre-existing debt, without more, will not place the taker in the situation of a holder for value, so as to protect himself against the equities subsisting between the original parties to the note, yet it is otherwise, if there is a new and distinct consideration, as if time was given in consideration of obtaining the note as security for the debt. *Depeau v. Waddington*, 6 Wharton, 220. In the subsequent case of *Appleton v. Donaldson*, 3 Barr, 381, the same Court decided that where a note is given by the maker to the payee for his accommodation, he may sell, discount, or pledge it for an antecedent debt ; the rule governing pledges of the property of others, not being applied to commercial paper of this character. *Rogers, J.* : "The case of *Petrie v. Clark* (11 Serg. & Rawle, 238), as to the general principle is affirmed in *Depeau v. Waddington*, with the expression of regret, that the negotiability of commercial paper should have been restrained, so as to prevent it from being pledged as a security for a debt. That it shall be still further extended is now the question. *Petrie v. Clark* was the case of a misapplication of funds, which the executor held as trustee for the benefit of creditors and legatees ; and for this reason, the latter were permitted to interpose a defence as against a person who in legal parlance had not paid value for it. The same equities were supposed to exist between them, as the original parties. But that case differs from this in this essential particular, that in *Petrie v. Clark* the executor was not the owner of the note pledged ; here the payee is the legal and

at the suit of his principal, (p) who may recover nominal damages, though he have sustained no actual injury. (1)

(p) *Van Wart v. Woolley, R. & Moo.* 4; 3 B. & C. 439, E. C. L. R. vol. 10; 5 D. & R. 374; 1 M. & M. 520, S. C.

equitable owner; the note is put into the hands of the payee by the maker, for the express purpose of using it in any manner which will best promote his interests."

The Supreme Court of the United States, however, have gone the full length of holding, that receiving a note in payment or as security for a pre-existing debt is according to the known usual course of business, and entitles the taker to all the rights and benefits of a holder bona fide and for valuable consideration. *Swift v. Tyson*, 16 Peters, 1. Story, J.: "It is for the benefit and convenience of the commercial world, to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor has also the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuitry to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one half of all bank transactions in our country as well as those of other countries are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts."

Besides the considerations thus forcibly presented as to the disastrous consequences of the doctrine upon commercial business generally, it may be observed, that when a note is transferred as collateral security, if forbearance is not actually stipulated for, it is most commonly implied, or at least there follows a remission of that vigilance and activity, which might otherwise have secured satisfaction of the debt. 1 Leigh's *Nisi Prius*, 477, American Edition, note (1). See also *Washington Bank v. Lewis*, 22 Pickering, 24. The plaintiffs had advanced some money and taken the note for that and as security for a prior debt: it was held to be available in their hands for both amounts, as the money was advanced for the purpose of securing the prior debt.

(1) A bank, by failing to demand payment of a bill received for collection, makes the bill its own, and becomes liable to its owner for the amount. *Bank of Washington v. Triplett*, 1 Peters, 25; *McKinster v. Bank of Utica*, 9 Wendell, 46, 11 Ibid. 473; *Stowe v. Bank*, 3 Devereux, 408; *Fabers v. Mercantile Bank*, 23 Pick. 330; *Branch Bank v. Knox*, 1 Alabama, 148; *Bank of Mobile v. Huggins*, 3 Ibid. 206; *Phipps v. Millbury Bank*, 8 Metcalf, 79; *Tyson v. State Bank*, 6 Blackford, 225.

As a principal is bound by his agent's contracts, so he may take *advantage of them, but he is subject to any defence, partial [*29] or complete, on which the defendant could have relied against the agent. A drawer delivered a bill to his agent to be discounted, the agent indorsed the bill as his own to the defendant, a bill broker, who procured it to be discounted, but handed over to the agent only a portion of the proceeds. The drawer, being afterwards obliged to take up the bill, sued the defendant for money had and received, to the drawer's use. It was held, that he was entitled to recover, and that a representation by the agent, that the bill was his own, would not preclude the principal from recovering, but only subject him to any defence, which the defendant might have set up against the agent.(q)

(q) *Bastable v. Pool*, 1 C. M. & R. 410; * 5 Tyr. 111, S. C.

It has been held in many cases that it is only necessary that an agent, whether a bank or individual, employed to collect a note or bill, should take the usual steps to fix the indorsers; and when, therefore, a notary public is employed by the agent to make demand, and give notice, and he is guilty of negligence, the agent is not liable. It would seem that the employment of a sub-agent not invested with public authority, as is a notary public, will not discharge the agent from his liability. *Belle-mire v. The Bank U. S.*, 1 Miles, 173, S. C. 4 Whart. 105. It may be a question, however, whether the employment of a competent sub-agent is not all the duty that is demanded of the agent in such a case; the agency being in general purely gratuitous. S. C. 4 Whart. 112; *Bank of Utica v. Smith*, 18 Johns. 239; *Smedes v. Bank of Utica*, 20 Ibid. 393; *Agricultural Bank v. Commercial Bank*, 7 Smedes and Marsh. 592; *Baldwin v. Bank of Louisiana*, 1 Louis. Ann. Rep. 13.

In South Carolina, however, it has been determined that the general custom of the bank to use the money so collected, is a sufficient consideration to subject them, in this respect, to the liability of a paid agent. *Thompson v. The Bank of the State*, 3 Hill, 77; S. C. Riley, 81; and see *Downer v. Madison Bank*, 6 Hill (N. Y.), 648. In the *Mechanics' Bank v. Earp*, 4 Rawle, 384, it was held that when a note is deposited with a bank to be transmitted for collection to another place, the bank was not liable for the laches of its correspondent. It seems that if the transmitting bank had entered into a special agreement or received a pecuniary reward for its services in *collecting* the bills, beyond a mere charge to cover expenses, and the bank to which the note was transmitted was its agent for that purpose, it would have been responsible for the neglect of such agent, and an action might have been maintained for damages commensurate with the injury sustained in consequence of such neglect. And see *Lawrence v. The Stonington Bank*, 6 Conn. 528; *Bank of New Orleans v. Smith*, 3 Hill, 560; *Allen v. Merchants' Bank*, 22 Wendell, 215; *Dorchester and Milton Bank v. New England*, 1 Cushing, 177; *The Montgomery County Bank v. Albany Bank*, 8 Barbour Sup. Ct. 396; *Commercial Bank v. Union Bank*, 1 Kernan, 203.

An agent who has authority to take cash in payment has thereby no authority to take bills.(r)(1)

A partnership is where several persons are jointly engaged in an undertaking with a communion of profit and loss.(s)

But, to render a man liable to third persons as a partner, it is sufficient if he merely hold himself out to the world as such, though he really have no interest whatever; or if he really have an interest, though his name does not appear.(t)

In treating of partnership in its relation to bills of exchange, we shall consider, first, the case of a partnership which is both actual and ostensible; secondly, the case of a secret or dormant partner; thirdly, the case of a mere nominal or ostensible partner; fourthly, the consequences of a dissolution; and lastly, the case of an occasional partnership.

First, as to a partnership both actual and ostensible. And, first, with respect to the rights and liabilities of the partners *inter se*.

In many deeds and agreements of partnership, there is a stipulation that one partner shall not draw, indorse, or accept bills without the consent of his copartner; the consequence of a violation of this stipulation is, *as between the partners*, to create a right of action at the suit of the injured partner against the partner violating it, and, [*30] as we shall presently see, to *protect the former against bills improperly drawn, and in the hands of a holder *with notice*.

Where a plaintiff is interested in a bill or note, both as plaintiff and jointly with the defendant, though the objection do not appear

(r) *Sykes v. Giles*, 5 M. & W. 645.* Post, Chapter xxv.

(s) But a communion of loss does not seem essential to the existence of a partnership. *Gilpin v. Enderby*, 5 B. & Ald. 954, E. C. L. R. vol. 7; 1 D. & R. 570, S. C.; *Bond v. Pittard*, 3 Mees. & Wels. 357; * *Fereday v. Hordern*, Jac. 144. Sed nec damni communio ad substantiam societatis pertinet; quippe quæ etiam ita constitui potest ut unus e sociis damni sit expers. Vin. Com. 3-26; see *Smith's Commercial Law*, 3d Ed. p. 21.

(t) *Pott v. Eyton*, 3 C. B. Rep. 32, E. C. L. R. vol. 54. And see post, as to occasional partnerships.

(1) An agent with authority only to collect a debt, cannot take a note for the amount of it, from the debtor to himself, and thus substitute himself as creditor; but if the principal subsequently ratifies such an arrangement, he is bound by it, and the debtor is released from liability to him on the original claim. *McCulloch v. McKee*, 16 Penna. State Rep. 289; *Corning v. Strong*, 1 Carter (Indiana), 329.

on the face of the declaration, he cannot sue on it. Thus, where M. sued on a note, and the defendants pleaded that the note was made by M., the plaintiff, and others jointly with the defendant, the plea was held a good plea in bar.^(u) So, where a note was made by E. in favor of the firm in which he was a member, viz. C., D., and E., and by them indorsed to A., B., and C., who, as indorsees, brought an action against D., and D. pleaded (not in abatement but in bar) that C., one of the plaintiffs, was also liable as an indorser, together with D., the defendant, the plea was held good.^(v) So, where the plaintiff, the holder of shares in a washing company, drew bills on the directors of the company for goods furnished by him, which bills were accepted for the directors by their secretary, in an action by the plaintiff against the directors, it was held that he could not recover. "It may be admitted," says Best, C. J., "that if a partner were to draw on other partners by name, and they were individually to accept, he might recover against them, because by such an acceptance a separate right is acknowledged to exist. But that is not the case here; for the bills are drawn on the directors of the company and accepted for the directors. They are the agents of the company, and accept as agents of the company. The case, therefore, is that of one partner drawing on the whole firm, including himself."^(w) An agent, and member of a company, employed to sell goods for the company, drew in his own name, and payable to his own order, a bill on a purchaser of the goods; he then indorsed it to the actuary of the company, who indorsed it to another member and creditor of the company. It was held that the last indorsee could not sue the drawer on the bill. "Both the defendants," say the Court, "were members of the company. If, therefore, the plaintiffs could recover on this bill, it would be a recovery by one joint contractor against another, and then the defendants would have a right to call on the plaintiffs for contribution. It is clear, therefore, that no action can be maintained upon the bill."^(x) But where a *married woman, being administratrix, received a sum of money in that character, and [*31] lending the same to her husband, took for it the joint and several

(u) *Moffat v. Van Millingen*, 2 B. & P. 124, n.

(v) *Mainwaring v. Newman*, 2 B. & P. 120.

(w) *Neale v. Turton*, 4 Bing. 149, E. C. L. R. vol. 13; 12 Moore, 365, S. C.

(x) *Teague v. Hubbard*, 8 B. & C. 345, E. C. L. R. vol. 15; 2 Man. & Ry. 369; Dans. & Ll. 118, S. C. But the mere holding of scrip only constitutes such an inchoate right of partnership as will not interfere with an action on a note given by the directors. *Fox v. Frith*, 10 M. & W. 131.*

promissory note of her husband and two other persons, it was held that, after her husband's death, she might maintain an action against the surviving makers.^(y) So, where the holder of a bill is also liable upon it, the technical difficulty in the way of an action may be removed by indorsement before the bill is due.^(z)

From these cases, the following general principles appear to result.

That in no case can a man sue, where on the face of the record he is both plaintiff and defendant.

Nor where he is both entitled and liable on the face of the instrument, though that does not appear on the declaration, and though the defendant omit to plead the non-joinder in abatement.

Nor in certain cases where he is both entitled and liable to contribute, though such liability appear neither on the instrument nor on the record.^(a) But the giving of a bill or note may be an acknowledgment of a separate right.^(b)

But that the mere technical difficulty of the same person being both entitled and liable on the face of the instrument, may be removed by death, survivorship, or transfer, provided there be no liability to contribute.

Secondly, as to the rights and liabilities of partners, both actual and ostensible, as between the firm and the world, in respect of bills and notes.

The law presumes, that each partner in trade is intrusted by his copartners with a general authority in all partnership affairs. Each partner, therefore, by making, drawing, indorsing, or accepting negotiable instruments,^(c) in the name of the firm, and in the course of

^(y) *Richards v. Richards*, 2 B. & Ad. 447, E. C. L. R. vol. 22; see *Rose v. Poulton*, 2 B. & Ad. 822, E. C. L. R. vol. 22.

^(z) *Morley v. Culverwell*, 7 M. & W. 174; * *Steele v. Harmer*, 15 L. J. 219, Exch.; 14 M. & W. 831, * and 19 L. J. 34; 4 Ex. Rep. 1, * S. C. in error.

^(a) But see as to Joint Stock Companies, 7 & 8 Vict. c. 110, s. 45, and 8 & 9 Vict. c. 16; and as to Joint Stock Bank Companies, 1 & 2 Vict. c. 96; 3 & 4 Vict. c. 111; 5 & 6 Vict. c. 85.

^(b) See the observations of Best, C. J., in *Neale v. Turton*, 4 Bing. 149; E. C. L. R. vol. 13; 12 Moore, 365, S. C.; see also *Bedford v. Brutton*, 1 Bing. N. Ca. 399, E. C. L. R. vol. 27; *Andrews v. Ellison*, 6 B. Moore, 199; *Lomas v. Bradshaw*, 19 L. J. 273, C. B.

^(c) *Harrison v. Jackson*, 7 T. R. 207; *Pinkney v. Hall*, 1 Salk. 126; 1 Ld. Raym. 175, S. C.; *Lane v. Williams*, 2 Vern. 277; *Wells v. Masterman*, 2 Esp. 731; *Swan v. Steele*, 7 East, 210; 3 Smith, 199, S. C.; *Ridley v. Taylor*, 13 East, 175.

the partnership transactions, *binds the firm, whether he [*32] signs the name of the firm, or signs by procuration, or *accepts* in his own name, a bill drawn on the firm.(d)(1) But an action cannot be maintained against the firm where a partner has signed his own name only to an instrument, though the proceeds were in reality applied to partnership purposes,(e) unless the name of the signing partner were also the name of the firm ;(f) in which case it was formerly held that the holder might charge either the signing partner or the firm, at his election.(g) Where one of the partners indorsed the name of the firm on fictitious bills, the firm was held liable.(h)

But a partner cannot bind his copartner by a joint and several note,(i) and it is conceived that such a note would be void even as a joint note, for there was no implied authority from the copartner to sign any such instrument.

(d) *Mason v. Rumsey*, 1 Camp. 384; see *Jenkins v. Morris*, 16 M. & W. 879.*

(e) *Siffkin v. Walker*, 2 Camp. 308; *Ex parte Emly*, 1 Rose, 61; *Emly v. Lye*, 15 East, 7.

(f) *South Carolina Bank v. Case*, 8 B. & C., 427, E. C. L. R. vol. 15; 2 Man. & Ry. 459, S. C.; and see *Ex parte Bolitho*, 1 Buck. 100; *Swan v. Steele*, 7 East, 210; 3 Smith, 192, S. C.; and see post, 33.

(g) *Hall v. Smith*, 1 B. & C. 407, E. C. L. R. vol. 8; 2 D. & R. 484; *Clerk v. Blackstock*, Holt, 474; *March v. Ward*, Peake, 130; *Wilks v. Back*, 2 East, 142; but see now *Ex parte Buckley*, *In re Clarke*, 14 M. & W. 469;* 15 L. J. Bkey, 3 S. C.

(h) *Thicknesse v. Bromilow*, 2 C. & J. 425.*

(i) *Perring v. Hone*, 4 Bing. 28, E. C. L. R. vol. 13; 12 Moore, 125; 2 C. & P. 401, S. C.

(1) Partners are bound by a note given by one partner in the partnership name, although in violation of private instructions from one partner to another. *Miller v. Hughes*, 1 A. K. Marsh. 181; *Bascom v. Young*, 7 Missouri, 1; *Gano v. Samuel*, 14 Ohio, 592.

A partner has no right to bind his copartner by a note, except in a partnership transaction. *Wagnon v. Clay*, 1 A. K. Marsh. 257. It is binding nevertheless in the hands of a bona fide holder without notice. *Hawes v. Dunton*, 1 Bailey, 146. See *Foster v. Andrews*, 2 Penna. Rep. 160; *Huntington v. Lyman*, 1 Chip. 438; *Munroe v. Cooper*, 5 Pick. 412; *Chazournes v. Edwards*, 3 Pick. 5; *Catskill Bank v. Stall*, 15 Wend. 364; *Baird v. Cochran*, 4 S. & R. 397; *Davenport v. Ranlett*, 3 N. Hampshire, 386; *Weed v. Richardson*, 2 Dev. & Bat. 535; *Ralston v. Click*, 1 Stewart, 526; *Graeff v. Hitchman*, 5 Watts, 454; *Livingston v. Roosevelt*, 4 Johns. 251; *Smith v. Lusher*, 5 Cowen, 688; *Williams v. Walbridge*, 3 Wend. 415; *Morcein v. Andrus*, 10 Wend. 461; *Holmes v. Burton*, 9 Verm. 252; *Flemming v. Prescott*, 3 Richardson, 307; *King v. Faber*, 22 Penna. Stat. Rep. 21.

The firm is not liable where the partner varies the style of the firm, unless there be some evidences of assent by the firm to the variation, or unless the name used, though inaccurately, yet substantially describe the firm.^(k) Therefore, where a firm consisted of John Blurton and Charles Habershon, who carried on business under the firm of John Blurton, it was held that the firm was not bound by an *indorsement*, by one partner, who had written John Blurton and Co.^(l) And where defendants never traded under the firm of Dry and Co., but only under the firm of Dry and Everett, it was held that defendant Everett was not bound by a bill accepted by Dry, not for partnership purposes, in the name of Dry and Co.^{(m)(1)}

[*33] But if a bill be drawn on a firm, *and *accepted* by one partner in his own name for partnership purposes, that acceptance will bind the firm.⁽ⁿ⁾⁽²⁾

It has been held, that as the drawing or accepting of bills is not in general necessary in a farming or mining concern, bills accepted by one of the partners in such a concern, without express authority, do not bind the firm.^(o)

The members or directors of a joint-stock company cannot, in general, bind the company by bills.^(p) But if such an authority

(k) *Williamson v. Johnson*, 1 B. & C. 146, E. C. L. R. vol. 8; 2 D. & R. 281; *Faith v. Richmond*, 11 Ad. & E. 339, E. C. L. R. vol. 39; 3 Per. & D. 187, S. C.

(l) *Kirk v. Blurton*, 9 M. & W. 284.*

(m) *Sheppard v. Dry*, Norwich, 1840; Cor. Parke, B., affirmed in Q. B. Quære, whether a partner may not bind his copartner by signing the true names of the partners, though such names be not the style of the firm. *Norton v. Seymour*, 16 L. J. 100, C. B.; 3 C. B. Rep. 792, E. C. L. R. vol. 54, S. C.

(n) *Mason v. Rumsey*, 1 Camp. 384.

(o) *Greenslade v. Dower*, 7 B. & C. 635, E. C. L. R. vol. 14; 1 M. & R. 640, S. C.; *Dickinson v. Valpy*, 10 B. & C. 128, E. C. L. R. vol. 21; 5 M. & R. 126; *Russell v. Pollett*, executors, 1840.

(p) *Bramah v. Roberts*, 3 Bing. N. C. 963, E. C. L. R. vol. 32; 5 Scott, 172, S. C.; *Bult v. Morrell*, 12 Ad. & Ell. 745, E. C. L. R. vol. 40.

(1) A promissory note given by one of two partners in the business of farming and cooperating, signed "A. B. and C. D." is binding upon both. *McGregor v. Cleveland*, 5 Wend. 475. A note made by one partner, in which he says, "I promise to pay," &c., but subscribes the partnership name, "A. B. & Co.," is binding on the firm, and not on the partner alone who executed it. *Doty v. Bates*, 11 Johns. 544.

(2) One copartner may bind the firm by a bill of exchange drawn by him in his own name upon the firm for a partnership debt. It may be treated as an accepted bill. *Dougal v. Cowles*, 5 Day, 511.

exist, it will receive a reasonable construction in favor of a bona fide holder for value.(q)

And partners not in trade cannot bind each other by bills. Therefore one attorney, who is partner with another, has not from that circumstance alone, power to bind his copartner by a bill or note.(r)(1)

Even if a partner exceed his authority, and pledge the partnership credit on a negotiable security for his own private advantage, his copartners are liable. And if there be a good defence against one of several partners or coplaintiffs suing on a bill, note, or other joint contract, it is a good defence against all; although the copartner or coplaintiff to whose right to sue the objection applies, have been guilty of a fraud on his copartners and companions, and they have been innocent of it. "Are they not bound by his acts," says Lord Ellenborough, "when they are to recover by his strength?"(s) The defrauded partner's remedy (at least during his companion's lifetime) must be in equity.(t) Thus if one partner assume to relieve an acceptor of his responsibility, the firm lose their action. Two bills had been drawn by a partnership, and accepted, and it was proved that the value received for the acceptance had been employed in taking up other acceptances for the accommodation of the partnership; the promise of one partner, in fraud of his copartners, to provide

(q) *Thompson v. Wesleyan Newspaper Association*, 19 L. J. 114, C. P.

(r) *Headley v. Bainbridge*, 3 Q. B. Rep. 316, E. C. L. R. vol. 43.

(s) *Richmond v. Heapy*, 1 Stark. 204, E. C. L. R. vol. 2.

(t) See *Jones v. Yates*, 9 B. & C. 539, E. C. L. R. vol. 17; *Gordon v. Ellis*, 7 M. & G. 607, E. C. L. R. vol. 49; 2 C. B. Rep. 821, E. C. L. R. vol., 52.

(1) A. and B. entered into a contract with C. for a conveyance from him to them of a farm, and agreed to pay a part in good negotiable notes, to be indorsed by them: held, that this will not constitute them special partners, so that the indorsement of the names of both by one, without the other, will bind both. *Ballou v. Spencer*, 4 Cowen, 163. A partner in the practice of physic, has no power to bind his copartner by the execution of a note in the name of the firm, for the purpose of raising money for his own accommodation. *Crothwait v. Ross*, 1 Humph. 23. The rule that a note given by one partner in the partnership name, for his individual debt, is good against the firm in the hands of a bona fide holder, applies only to notes of mercantile partnerships, and does not apply to those of partnerships for keeping tavern. *Cocke v. Branch Bank*, 3 Alabama, 175.

The law presumes that the holder, if he inquired at all into the partnership of the makers, must have received information that they were not partners in a mercantile trade, but only in the business of tavern-keeping. This ascertained, he took the note at his peril. *Ibid*.

[*34] for the acceptances, *was held to be a sufficient defence to an action by them against the acceptor.(*tt*)

So, where D. drew a bill in his own name, and gave the acceptor a memorandum, in writing, that he would provide for it when due, having indorsed it to the firm of A., B., C., and D., it was held that the firm were bound by his acts, and could not recover against the acceptor.(*u*)

But, if the party taking a bill or note of the firm knew, at the time, that it was given without the consent of the other partners, *he* cannot charge them.(*v*) And the taking a joint security for a separate debt raises a presumption that the creditor knew that it was given without the concurrence of the other partners.(*w*) If there existed fraud and collusion between the partner and his creditor, the bill is void in the hands of the fraudulent holder, not only against the partnership, but against other parties to the bill.(*x*) But securities which may be unavailing against the firm, when in the hands of the party privy to the transaction, will nevertheless bind them, when in the hands of an innocent indorsee for value.(1)

(*tt*) *Richmond v. Heapy*, 1 Stark. 202, E. C. L. R. vol. 2.

(*u*) *Sparrow v. Chisman*, 9 B. & C. 241, E. C. L. R. vol. 17; 4 M. & R. 206.

(*v*) *Richmond v. Heapy*, 1 Stark, 202, E. C. L. R. vol. 2; *Arden v. Sharp*, 2 Esp. 524; *Barber v. Backhouse*, Peake, 61; and see *Wallace v. Kelsall*, 7 M. & W. 264; **Jones v. Yates*, 9 B. & C. 532, E. C. L. R. vol. 17; *Jacaud v. French*, 12 East, 317; *Gordon v. Ellis*, 7 M. & G. 607, E. C. L. R. vol. 49.

(*w*) *Ex parte Bonbonus*, 8 Ves. 540; *Wells v. Masterman*, 2 Esp. 731; *Green v. Deakin*, 2 Stark. 347, E. C. L. R. vol. 3; *Ex parte Gouldney*, 2 G. & J. 118; 8 L. J. Bkcty. 1, S. C.

(*x*) *Ridley v. Taylor*, 13 East, 175.

(1) The doctrine of the text is sustained by the whole current of the American authorities. A note made by one partner in the name of the firm will be presumed to have been made in the course of partnership dealings; and that it was given for the individual debt of one of the partners, is matter of defence which must be proved by the party suggesting it. This is so even though the partnership be limited to a particular branch of business. *Doty v. Bates*, 11 Johns, 544; *Barrett v. Swann*, 17 Maine, 180; *Ensminger v. Marvin*, 5 Blackford, 210; *Knapp v. McBride*, 7 Alabama, 19; *Hamilton v. Summers*, 12 B. Monroe, 11. Where a person receives a partnership note for the individual debt of a partner, he is chargeable with notice, and cannot enforce payment of the note against the other members of the firm. *Miller v. Manice*, 6 Hill, 115; *Maudlin v. Branch Bank*, 2 Alabama, 502; *Stainer v. Tysen*, 3 Hill, 279; *Noble v. McClintock*, 2 Watts & Serg. 152; *Smyth v. Strader*, 4 Howard (U. S.) Rep. 404; *Williams v. Gilchrist*, 11 New Hamp. 535. Such a note is binding when given with the assent of the other partners, and such an assent may be implied from facts and circumstances. *Gansevoort v. Williams*, 14

Articles of agreement between the partners, that no one partner shall draw, accept, or negotiate bills of exchange, will not protect

Wendell, 133. Assent must be clearly shown and not left to be inferred from vague and slight circumstances. *Kemeys v. Richards*, 11 Barbour S. C. Rep. 312; *McKinney v. Bright*, 16 Penna. State Rep. 399. If the firm afterwards should with knowledge reap the fruits of the transaction, as where an administrator gave the note of his firm for a debt of his intestate, and afterwards applied to the partnership money which belonged to the estate. *Richardson v. French*, 4 Metcalf, 577; *Whitaker v. Brown*, 11 Wendell, 75. Though the payee of a partnership note believed that the proceeds of the note were to be applied to the individual debts of one of the firm, the note would still be binding on the firm, if the proceeds were in fact used by the firm. *Hamilton v. Summers*, 12 B. Mon. 11. The admissions of the partner who gave the note are not evidence to show the assent of the partnership. *Hickman v. Reineking*, 6 Blackford, 387. The bona fide holder of such a note, however, is undoubtedly protected. There must be express notice or such gross negligence in the holder as is equivalent to it. If one of several partners obtain a loan of money for his individual use, by giving the note or check of the firm, but without their authority, the transaction will nevertheless bind all the partners, unless there be something in it to induce the lender to suspect that the money is not borrowed for their benefit. *Miller v. Manice*, 6 Hill, 114. See *Long v. Carter*, 3 Iredell Law Rep. 238; *Duncan v. Clark*, 2 Richardson, 587. An indorsement by a partner of his separate accommodation note with the name of his firm, is a sufficient indication of the nature of the transaction, to make it the duty of the holder to inquire into his authority to use the firm name for the occasion, unless there are circumstances from which the authority can be implied. *Tanner v. Hall*, 1 Penna. State Rep. 417. "A partner," says C. J. Hosmer, "strictly speaking, has an implied authority by virtue of the partnership connection to perform acts, and make contracts, only within the limits of the partnership covenant. But as persons dealing with him cannot always know when he is acting within the sphere allotted him, and when for his own use, those who are not guilty of gross negligence and act bona fide are protected in their contracts, whatever may be the concealed obliquity of his conduct. Hence, if he raise money on a bill or note, signed or indorsed in the name of the firm, the partnership is bound, although he performed the act with a view to his own individual use. On the same principle, if the person receiving the bill had knowledge that he was violating his duty to his partners, yet if the bill came bona fide into the hands of a purchaser, he acquires a right to subject the partnership. Public convenience demands the establishment of these principles. If a secret fraud of the nature above mentioned were to vitiate a note or bill, it would demand inquiries which could not often be made or satisfied, before either of them could safely be received, and thus would operate as a pernicious impediment to their free circulation. But neither justice nor convenience requires, that the person who has knowledge of the fraud, or is ignorant through gross negligence, should have a right to subject a partnership by the contract of one of the partners made for his own benefit. If, therefore, at the time he received the instrument from one of the partners, he knew, or had reason to believe, that it was in payment of the partner's debt, or for his own peculiar advantage, aside of the partnership benefit, he

the firm against bills drawn, accepted, or indorsed, in violation of the agreement, unless the holder had, at the time of taking the bill, notice of the stipulation. But if notice of such agreement can be brought home to the holder, or if, in the absence of such agreement between the partners, the other partners have given him notice that they will not be responsible for bills circulated by their copartner, the firm cannot be charged, though the bill was given in the course of partnership transactions.(y)

The proper mode of raising the defence of unauthorized and fraudulent acceptance by one partner, and notice to the plaintiff, is by a traverse of the acceptance.(z)

If the defendants show that the bill was circulated in violation of [*35] partnership articles, it has been held that *they will thereby put the plaintiff to prove that he gave value for it.(a) But it seems, from a recent decision in the Court of Queen's Bench, after conference with the Judges of the other Courts, that in order to maintain the action, where it appears that one partner has accepted in fraud of his copartners, *and where issue is taken on the acceptance*, it is not necessary for the plaintiff to prove that he gave value,

(y) Galaway v. Mathew, 10 East, 264; 1 Camp. 403, S. C.

(z) Jones v. Corbett, 2 Q. B. Rep. 828, E. C. L. R. vol. 42; Grout v. Enthoven, 1 Exch. Rep. 382; * 17 L. J. 70, Ex. S. C.

(a) Grant v. Hawkes, Chitty, 42.

acquires no right by this attempted prostitution of the firm.' New York Firemen Ins. Co. v. Bennett, 5 Conn. 574.

It is not within the general scope of the authority of a partner to give guarantees, or become surety, or issue paper for the accommodation of third persons, in the name of the firm. Where this appears on the face of the transaction, or is known to a subsequent holder before taking it, the note is not binding, unless he can show the assent or subsequent ratification of the other partners. Bank of Rochester v. Bowen, 7 Wendell, 158; Sweetser v. French, 2 Cushing, 309; Andrews v. Planters' Bank, 7 Smedes & Marshall, 192; Langan v. Hewitt, 13 Ibid. 112; Rollins v. Stevens, 31 Maine, 454; Lang v. Waring, 17 Alabama, 145. Nevertheless a bona fide holder, without notice, of an accommodation note, indorsed with the name of a firm by one of the members without the assent of the other, is entitled to recover from the partnership. Austin v. Vandermark, 4 Hill, 259; Maudlin v. Branch Bank, 2 Alabama, 502; Catskill Bank v. Stall, 15 Wendell, 364; S. C. 18 Wendell, 466; Wells v. Evans, 20 Wendell, 251; S. C. 22 Wendell, 324; Emerson v. Harmon, 14 Maine, 271; Waldo Bank v. Lambert, 16 Maine, 416; Beach v. The State Bank, 2 Carter (Indiana), 488. On proof, however, of the manner in which the note was made or indorsed, in fraud of the partnership, the holder will be required to show his bona fides, and the value he gave for it. Bank of St. Alban's v. Gilliland, 23 Wendell, 311.

but the defendants must affect the plaintiff with notice of the fraud,(b) or otherwise impeach his title.

If a man be at one time a partner in two distinct firms, but each firm use the same style, and he draw a bill in the common name of both firms, it has been held, that an indorsee may charge either firm at his election.(c)

But where the name of the firm is the same as the name of the individual, and the bill is drawn by the individual for his separate benefit, perhaps the firm is not pledged.(d)(1)

If a new partner be introduced into the firm, an acceptance by the old partners for an old debt in the name of the new firm, will not, in the hands of the party taking it, bind the new partner.(e)

The taking security from one of several partners, joint makers of a note, or acceptors of a bill, will, in general, discharge the other co-partners.(f) But, where one of three partners, after a dissolution of partnership, undertook to pay a particular partnership debt on two

(b) *Musgrave v. Drake*, 6 Q. B. Rep. 185, E. C. L. R. vol. 51. The case of *Grant v. Hakes*, however, does not appear to have been brought to the notice of the Court, though, perhaps, distinguishable.

(c) *Baker v. Charlton*, Peake's N. P. C. 80; *M'Nair v. Fleming*, Mont. 32; *Swan v. Steel*, 7 East, 210; 3 Smith, 109, S. C.; see, however, *Ex parte Buckley*, In re Clarke, 14 M. & W. 469; * 15 L. J. Bkcy. 3 S. C.

(d) See *Ex parte Bolitho*, 1 Buck. 100, and the observations of Bayley, B., on that case in *Wintle v. Crowther*, 1 C. & J. 316; * 1 Tyr. 210, S. C.; and see *Furze v. Sharwood*, 11 L. J., Q. B. 121; 2 R. B. 388, S. C., and *Ex parte Buckley*, supra.

(e) *Shirreff v. Wilks*, 1 East, 48.

(f) *Evans v. Drummond*, 4 Esp. 89; *Thompson v. Perceval*, 5 B. & Ad. 925, E. C. L. R. vol. 27; 3 N. & M. 667, S. C.

(1) A note in common form, signed by an individual in whose name a partnership is carried on, and who at the same time openly transacts business on his own account, does not prima facie bind his copartners. *Manufacturers' and Mechanics' Bank v. Winship*, 5 Pick. 11.

A note given in the individual name of one partner, is prima facie deemed his individual obligation, unless his partner be a dormant partner. *Scott v. Colmesnil*, 7 J. J. Marsh. 416. To render a firm responsible for a note given by one member thereof in his own name, it must appear that the credit was given to the firm, and that the money obtained by the note went to the business of the firm, otherwise it will be treated as an election by the creditor to trust to the responsibility of the maker of the note alone. *Foster v. Hall*, 4 Humph. 346. In re *Warren, Daveis*, 320; *Buckner v. Lee*, 8 Georgia, 285.

bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills, it was held that, the separate notes having proved unproductive, he might still resort to his remedy against the other partners; and that the taking, under these circumstances, the separate notes, and even afterwards renewing *them several times [*36] successively, did not amount to satisfaction of the joint debt.(g)

Where the circumstances were such that the partner had not power to bind the firm by a bill, subsequent recognition of the act will be equivalent to previous authority.(h)

Secondly, as to the case of a secret or dormant partner. A dormant partner, whose name does not appear, is bound by bills drawn, accepted, or indorsed by his copartners *in the name of the firm*, and not only when the bills are negotiated for the benefit of the firm, but when they are given by one of the partners for his own private debt, provided the holder were not aware of this circumstance:(i) for credit is given to the firm generally, of whomsoever it may consist.

But where a man agreed to become a dormant partner in a firm, and the secret partnership was to commence from a time past, and after the stipulated time for the commencement of the partnership, but before the actual agreement, the members of the firm had negotiated bills in the name of the firm, and applied the proceeds to their own benefit, the incoming partner, though a partner by relation at the time the bills were negotiated, was held not liable. He could not be charged on the ground of interest, for he derived no benefit from the bills; nor on the ground of credit having been given to him, for he was no member of the firm at the time; nor on the ground of having ratified the acts of his copartners, for there can be no ratification where there was no assumed authority.(k)

(g) *Bedford v. Deakin*, 2 B. & Al. 210; 2 Stark. 178, E. C. L. R. vol. 3, S. C.

(h) *Duncan v. Lowndes*, 3 Camp. 478; and see *Vere v. Ashby*, 10 B. & C. 288, E. C. L. R. vol. 21; and *Wilson v. Tumman*, 6 M. & G. 236, E. C. L. R. vol. 46. As to Banking partnerships, see *Corporations and Companies*.

(i) *Vere v. Ashby*, 10 B. & C. 288, E. C. L. R. vol. 21; *Lloyd v. Ashby*, 2 B. & Ad. 53, E. C. L. R. vol. 22; *Swan v. Steele*, 7 East, 210; 3 Smith, 199, S. C.

(k) *Vere v. Ashby*, 10 B. & C. 288, E. C. L. R. vol. 21; see *Battley v. Lewis*, 1 M. & G. 155, E. C. L. R. vol. 39; 1 Scott, N. R. 143, S. C.; and *Wilson v. Tumman*, 6 M. & G. 236, E. C. L. R. vol. 46.

A dormant partner may join and sue on a bill,^(l) or the ostensible party may sue alone.^(m) But the non-joinder of a dormant partner as defendant cannot be pleaded in abatement.⁽ⁿ⁾

Thirdly, as to a mere nominal or ostensible partner. Though a *man really have no interest in a firm, yet if he suffer himself to be held out to the world as a member of it, he thereby [*37] authorizes those to whom he has been held out, to treat him as a contracting party; for as they cannot know whether his interest be merely apparent or real, they would be injured and defrauded, if they could not charge him as a partner.^(o)

Fourthly, as to the consequences of a dissolution. After a dissolution, the ex-partners have no longer power to bind each other by bills or notes to persons aware of the dissolution.^(p) But notwithstanding a valid dissolution of an ostensible partnership by an agreement between the partners, still the authority of the ex-partners to bind each other by bills, notes, or other contracts, within the scope of the former partnership, continues till the dissolution be duly notified.⁽¹⁾

Such notice may be either express or implied.

The only safe mode of proceeding is to give express notice to every person who has had dealings with the firm, and as the holders of negotiable securities often cannot be known, to advertise the dissolution in the *London Gazette*.

(l) *Cothay v. Fennell*, 10 B. & C. 671, E. C. L. R. vol. 21; *Skinner v. Stocks*, 4 B. & Ald. 437, E. C. L. R. vol. 6.

(m) *Leveck v. Shafto*, 2 Esp. 468; *Lloyd v. Archbowl*, 2 Taunt. 324; and see *Mawman v. Gillett*, 2 Taunt. 325, n.; *Kell v. Nainby*, 10 B. & C. 20, E. C. L. R. vol. 21.

(n) *De Mautort v. Saunders*, 1 B. & Ad. 398, E. C. L. R. vol. 20.

(o) Where the contract is made with a firm in which there is a nominal partner, the real partner may sue alone without joining the nominal partner as co-plaintiff. *Kell v. Nainby*, 10 B. & C. 20, E. C. L. R. vol. 21. To make a man liable as a nominal partner, he must have been held out as such to the plaintiff. Per Parke, J., *Dickenson v. Valpy*, 10 B. & C. 141, E. C. L. R. vol. 21; 5 M. & Ry. 126, S. C.

(p) *Heath v. Sansom*, 4 B. & Ad. 172, E. C. L. R. vol. 24; 1 Nev. & M. 104, S. C.

(1) A valid title to a negotiable promissory note, payable to a copartnership firm, may be transferred by an indorsement made in the name of the firm, by one of the copartners, though after the dissolution of the copartnership, if such dissolution was unknown to the indorsee. *Cony v. Wheelock*, 33 Maine, 366.

The ex-partners are not safe against any of the persons whose names are on a bill of exchange, unless notice be given to each. After a dissolution, one of the ex-partners accepted a bill in the name of the firm; the payee had no notice of the dissolution, but the indorsee had. It was held, that though the indorsee had had notice of the dissolution, he could recover on the bill against the firm, because the payee had had no notice, and the indorsee had a right to stand on the payee's title.(q)

When bankers had dissolved partnership, a change in their printed check was, as against a person who had drawn a check in a new form, held sufficient notice of the dissolution. Lord Ellenborough: "I think the change was sufficiently notified by the change in the check. It is the habit of banking-houses to intimate in this manner that a partner has been introduced or has retired."(r)

Where a bill had been accepted by an ex-partner, in the name of [*38] the *firm, in favor of an attorney who had a year before prepared the draft of a deed of dissolution between the partners, which deed it did not appear had ever been executed, Lord Ellenborough held, that if the attorney would insist on the continuance of the partnership, it lay on him to show that the intention to dissolve had been abandoned.(s)

A notice of the dissolution in the *Gazette* is not sufficient to exempt a retiring partner from responsibility to a former dealer with the firm, unless it be shown that such dealer was in the habit of reading the *Gazette*.(t) But a mere notice in the *Gazette* has been held, as against a man who had had no previous dealings with the firm, evidence from which a jury might infer notice of dissolution.(u) An advertisement of a dissolution in a newspaper is not even admissible, without proof that the party sought to be affected with such notice

(q) *Rooth v. Quin*, 7 Price, 193.

(r) *Barfoot v. Goodhall*, 3 Camp. 147; and see *Vise v. Fleming*, 1 Younge & J. 227.*

(s) *Paterson v. Zachariah*, 1 Stark, 71, E. C. L. R. vol. 2.

(t) *Godfrey v. Turnbull*, 1 Esp. 371; *Lesson v. Holt*, 1 Stark. N. P. C. 186; *Graham v. Hope*, Peake's N. P. C. 154; *Gorham v. Thompson*, Ib. 42; *Rex v. Holt*, 5 T. R. 443; *Williams v. Keats*, 2 Stark. N. P. C. 290, E. C. L. R. vol. 3; see also *Ex parte Usburne*, 1 Glyn. & Jam. 358. A notice of dissolution in the *Gazette* may be given in evidence without a stamp. *Jenkins v. Blizzard*, 1 Stark. N. P. C. 418.

(u) *Godfrey v. Turnbull*, 1 Esp. 371; *Newsomes v. Coles*, 2 Camp. 617.

took in the newspaper.(v) But then it is not necessary that the dissolution should have been advertised in the *Gazette*.(w)(1)

A secret partner is not liable after a dissolution without notice, on a bill or note given by the continuing partners in the name of the firm; for the contract was not made on his credit, nor had he any interest in it.(x)(2)

Where the dissolution is by death, notice is not necessary to protect the estate of the deceased.(y)

After a dissolution, and the due notice thereof, the ex-partners become tenants in common of the partnership effects, and their authority as mutual agents is at an end.

One cannot, therefore, indorse in the name of the firm a bill which belonged to the firm, but all must join:(z) though *the ex- [*39] partner indorsing have authority to settle the partnership

(v) *Leeson v. Holt*, 1 Stark, 186, E. C. L. R. vol. 2; *Boydell v. Drummond*, 11 East, 142; *Norwich Navigation Company v. Theobald*, 1 M. & M., N. P. C. 153, E. C. L. R. vol. 22; *Jenkins v. Blizard*, 1 Stark. 420, E. C. L. R. vol. 2; *Hovil v. Browning*, 7 East, 161; *Rowley v. Horne*, 3 Bing. 2, E. C. L. R. vol. 11; 10 Mo. 247.

(w) *Rooth v. Quin*, 7 Price, 193.

(x) *Evans v. Drummond*, 4 Esp. 89; *Newmarch v. Clay*, 14 East, 239; *Heath v. Sansom*, 4 B. & Ad. 172, E. C. L. R. vol. 24; 1 N. & M. 104, S. C.

(y) *Vulliamy v. Noble*, 3 Mer. 619.

(z) *Abel v. Sutton*, 3 Esp. 108; *Kilgour v. Finlayson*, 1 H. B. 155; but see *Lewis v. Reilly*, 1 Q. B. Rep. 349, E. C. L. R. vol. 41.

(1) The rules of the mercantile law in regard to notice of dissolution have been fully adopted in this country. The cases are too numerous to cite, but some of the more recent ones, in which the earlier ones are to be found referred to, are, *Simonds v. Strong*, 24 Vermont, 642; *Conro v. The Port Henry Iron Co.* 12 Barbour, 27; *Brown v. Clark*, 14 Penna. State Rep. 469; *Davis v. Allen*, 3 Comstock, 168; *Wardwell v. Knight*, 2 Barb. S. C. Rep. 549. To constitute a person a previous dealer with a firm, and entitled to actual notice of the dissolution of the partnership, he must have dealt directly with the firm; and it is not sufficient that he may have dealt in paper for which the firm was responsible. *Hutchins v. Bank of Tennessee*, 8 Humphreys, 418.

(2) *Scott v. Colmisnil*, 7 J. J. Marshall, 416; *Magill v. Merric*, 5 B. Monroe, 168. A partner whose name has not appeared in the firm, will be liable to persons dealing with the partnership after his retirement from it, if he was known to such persons as a member of the firm, either by direct transactions or public authority, and they have not received notice of the dissolution of the connection. But unless he was thus known as a partner, it seems, that he will not be liable to persons so dealing with the partnership after his retirement, even although no notice has been given. *Davis v. Allen*, 3 Comstock, 168.

affairs. "I even doubt much," says Lord Kenyon, "if an indorsement were actually made on a bill or note before the dissolution, but the bill or note was not sent into the world till afterwards, whether such indorsement would be valid."(*a*)(1)

But a statement by the ex-partner that he had left the assets and securities in the hands of the continuing partner, and that he had no objection to his using the partnership name, is evidence from which a jury may infer an authority to indorse.(*b*) An authority to indorse may be inferred, though the written agreement of dissolution contain no such authority. But an authority to the continuing partner "to wind up the business" will not enable him to indorse the securities of the late firm.(*c*) Both ex-partners ought, therefore, to indorse, and that is the proper mode of indorsing by persons who are not partners.(*d*) But if the outgoing partner suffer his name to appear as partner, new customers, notwithstanding notice in the *Gazette*, may charge him. K. and A. dissolved partnership, and advertised the dissolution in the *Gazette*. K. accepted a bill in the name of the firm, antedating it so that it appeared to have been drawn before the dissolution. This bill came into the hands of the indorsee, for value, without actual notice of the dissolution. A. had allowed his name to remain over the door of a hatter's shop in the Poultry, where the business had been carried on. Lord Ellenborough held A. liable on the bill, observing, that he had imprudently suffered notice to be given of the continuance of the partnership by permitting his name to remain over the door.(*e*)

(*a*) *Abel v. Sutton*, 3 Esp. 108.

(*b*) *Smith v. Winter*, 4 M. & W. 454.*

(*c*) *Ibid.*

(*d*) *Carvick v. Vickery*, 2 Doug. 653, n.

(*e*) *Williams v. Keats*, 2 Stark. 290, E. C. L. R. vol. 3; and see *Newsome v. Coles*, 2 Camp. 617; *Stables v. Ely*, 1 C. & P. 614, E. C. L. R. vol. 12.

(1) After the dissolution of a partnership, a power given to one of the late co-partners "to settle all demands in favor or against said firm," does not authorize him to give a note in the name of the firm. *Lockwood v. Comstock*, 4 M'Lean, 383; *Lusk v. Smith*, 8 Barb. S. C. 570; *Hamilton v. Seaman*, 1 Smith (Ind.), 129; *Humphries v. Chastain*, 5 Georgia, 166; *Long v. Story*, 10 Missouri, 636; *Draper v. Bissel*, 3 M'Lean, 275; *Parker v. Cousins*, 2 Grattan, 372; but see *M'Pherson v. Rathbone*, 11 Wendell, 96; *Myers v. Huggins*, 1 Strobhart, 473; *Hausen v. Irvin*, 3 Watts & Serg. 345; *Robinson v. Taylor*, 4 Penna. State Rep. 242; *Davis & Desauque*, 5 Wharton, 530. A promise made by a partner, after the partnership has been dissolved, to pay a note on which the firm are indorsers, no notice of dishonor having been given, is not binding upon the other members of the firm. *Schoneman v. Fegely*, 7 Penna. State Rep. 433. See 41 M. & W. 10

If one partner die, being liable or entitled on a bill or note, the legal right or liability survives, but the personal representatives of the deceased are entitled or liable in equity.(f)

Bankruptcy is a dissolution, and therefore it was held, before the 2 & 3 Victoria, c. 29, that an indorsement by one of the several partners, after a secret act of bankruptcy, is invalid.(g) *But it has been also held, that, as they still hold themselves out to the world as partners, they are liable to third persons;(gg) and it is conceived that the giving of a bill by or to the bankrupt, without notice of an act of bankruptcy, would be a payment, protected by 6 Geo. 4, c. 16, s. 82,(h) independently of the protection against a secret act of bankruptcy, afforded by the 2 & 3 Victoria, c. 29.(i)

Lastly, as to an occasional partnership.

A partnership may be either a general partnership, or a particular one for a single transaction.

An interest in the profits of a single transaction makes a man a partner, and liable to third parties.(k)

A joint security given by one partner, in a mere occasional partnership, for a private separate debt, does not charge his copartner, though in the hands of a bona fide holder for value.(l)

The executor of a deceased party to a bill or note has, in general, the same rights and liabilities as his testator. "The executors of every person," says Lord Macclesfield, "are implied in himself, and bound without naming."(m)

Therefore, if a bill be indorsed to a man who is dead, by a person ignorant of his death, that will be an indorsement to the personal representative of the deceased.(n) On the death of the holder of a

(f) Lane v. Williams, 2 Vern. 277; Bishop v. Church, 2 Ves. sen. 100, 371; Vulliamy v. Noble, 3 Mer. 614; Heath v. Percival, 1 P. Wms. 682; 1 Stra. 403, S. C.

(g) Thomason v. Frere, 10 East, 418.

(gg) Lacy v. Woolcott, 2 D. & R. 458, E. C. L. R. vol. 16.

(h) Post, Chapter on *Bankruptcy*.

(i) See now 12 & 13 Vict. c. 106.

(k) Heyhoe v. Burge, 19 L. J. 243, C. P.

(l) Williams v. Thomas, 6 Esp. 18.

(m) Hyde v. Skinner, 2 P. Wms. 196. See Williams v. Burrell, 1 C. B. Rep. 402, E. C. L. R. vol. 50.

(n) Murray v. East India Company, 5 B. & Ald. 204, E. C. L. R. vol. 7.

bill or note, his executors or administrators may indorse ;(*o*) and an indorsement by the executors or administrators is for all purposes as effectual as an indorsement by the deceased. (*p*)(1)

Presentment, (*q*) notice of dishonor, and payment, should be made by and to the executor or administrator, in the same manner as by or to the deceased. (2)

If the holder be dead, and the executor have not yet proved the will, still it seems the executor is bound to present the bill when [*41] presentable ;(*r*) for his title to his testator's property *is derived exclusively from the will, and vests in him from the moment of the testator's death. (*s*) But, as the title of an administrator is derived wholly from the Ecclesiastical Court, and he has none till the letters of administration are granted, he would probably be excused by impossibility. (3)

(*o*) *Rawlinson v. Stone*, 3 Wils. 1 ; 2 Stra. 1260, S. C.

(*p*) *Watkins v. Maule*, 2 Jac. & Walker, 243 ; but it is conceived that one of several executors cannot indorse in his own name alone. *Vide infra*.

(*q*) *Molloy*, 2, 10.

(*r*) *Marius*, 135 ; *Molloy*, 2, 10 ; *Poth.* 146.

(*s*) *Com. Dig. Adminis. B.* 10 ; *Woolley v. Clark*, 5 B. & Ald. 745-6, E. C. L. R. vol. 7 ; 1 Dowl. & Ry. 409, S. C.

(1) A promissory note payable to an intestate, while uncollected, belongs to the administrator, and its payment can only be enforced by him. *Morse v. Clayton*, 13 Smedes & Marsh. 373. An administrator may assign a promissory note payable to his intestate, so as to vest the legal interest in the assignee. *Cahoun v. Moore*, 11 Vermont, 604 ; *Morse v. Clayton*, 13 Smedes & Marshall, 373 ; *Makepeace v. Moore*, 5 Gilman, 474 ; *Cryst v. Cryst*, 1 Smith (Ind.), 370.

The transfer of a note due to an estate by an administrator, in payment of his own debt, gives to the assignee with notice no right of recovery. *Scott v. Searles*, 7 Smedes & Marsh. 498.

Where a note was made payable to E. R. administrator, and M. B. administratrix of J. B., it was held that E. R. alone could not assign such note. *Sanders v. Blain*, 6 J. J. Marsh. 446. But a note to the intestate may be transferred by one of several administrators. *Ibid*.

(2) Notice of non-payment must be given to the executor of the indorser. *Hallett v. Branch Bank*, 12 Alabama, 193.

(3) An executor may commence an action before probate of the will : it is necessary that he should have taken out letters before filing his declaration. The executor derives his title from the will, and may act with full authority, except when in legal proceedings it becomes incumbent upon him to show his office. Then he cannot prove the will in the common law court ; for the cognizance of testamentary matters is exclusively vested in the ordinary, ecclesiastical, or probate courts. There is, however, no such a thing as an administrator without a legal grant from

A probate being a judicial act of the Ecclesiastical Court, is conclusive as to the validity and contents of the will, and the title of the executor; and, as long as it remains unrepealed, cannot be impeached in the temporal Courts. Therefore, a voluntary payment to an executor who has obtained probate by a forged will, is a discharge to the debtor, notwithstanding that the probate is afterwards declared null.(t)

Bills of exchange are to be paid in the course of administration, as simple contract debts. They are bona notabilia; not, as in case of a specialty, where the instrument is, but where the debtor resides at the time of the creditor's death.(u)

It is a general rule of law, that if a creditor constitute his debtor executor, the debt is released and extinguished; for the same hand being at once to receive and pay, the action is suspended: and a personal action, once suspended by act of the parties, is gone for ever.(v)(1) Hence it follows, that if the holder of a bill appoint the acceptor his executor, the acceptor is discharged, and all the other parties also, for a release to the principal discharges the surety. So it has been decided, that if the payee of a note, payable on demand, constitute the maker of the note his executor, the maker is discharged, not only from his liability to the estate of the testator, but also from his liability *as maker* to an indorsee to whom the executor assigned it after the testator's death.(w) But it is conceived, that if the note,

(t) *Allen v. Dundas*, 3 T. R. 125.

(u) *Yeomans v. Bradshaw*, Carthew, 373; 3 Salk. 70, S. C.

(v) Year Book, 20 Edw. 4, 17; 21 Edw. 4, 36; Dyer, 140; *Nedham's case*, 8 Rep. 135, a.; *Fryer v. Gildridge*, Hobart, 10; *Sturleyn v. Albany*, Cro. Eliz. 150; *Dorchester v. Webb*, Cro. Car. 372; *Wankford v. Wankford*, 1 Salk. 299; *Cheetham v. Ward*, 1 Bos. & Pul. 630.

(w) *Freakley v. Fox*, 9 B. & C. 130, E. C. L. R. vol. 17; 4 Man. & R. 18, S. C. See also *Harmer v. Steele*, 19 L. J. 37, Exch. Such a release in law might formerly have been made by an infant testator at the age of seventeen years complete; Co. Litt. 264, b.

the proper authority; the party entitled by law to letters has no title or authority before the grant. *Strong v. Perkins*, 3 N. Hamp. 140; *Call v. Ewing*, 1 Blackford, 301.

The title of an administrator, however, relates back to the death of his intestate. *Miller v. Reigne*, 2 Hill (S. Car.), 592; *Jewett v. Smith*, 12 Mass. 309; *Lawrence v. Wright*, 23 Pick. 128; *McVaughers v. Elder*, 2 Brevard, 307.

(1) The rule that the appointment of a debtor to be the executor of the creditor operates as a release of the debt, has been generally reversed by statute in the United States, or modified upon equitable principles. *Mitchell v. Rice*, 6 J. J. Marshall, 623.

at the time of the testator's death, had been in the hands of an indorsee, the executor would still have been liable as maker to the indorsee, and that if the note *had been payable at a period [*42] certain, and indorsed by the executor after the testator's death, but before the note was due, the executor would have been liable as maker to an indorsee without notice; for since a premature secret payment by the maker would not have protected him,(x) no more, it should seem, would a premature secret release to him.(y)

If one of several joint debtors be appointed executor, it is a release to all;(z) and though they were liable severally as well as jointly, for judgment and execution against one would have been a discharge to all;(a) and an express release to one might have been pleaded in bar by all.(b) The debt is also released where one only of several executors is indebted,(c) and though the executor die without having either proved the will or administered.(d)

But if a sole executor refuses to act, the debt is not discharged.(e) If the creditor makes the executor of the debtor his executor, that is no discharge.(f)

Though the appointment of a debtor to be executor releases him from liability to the first or any subsequent representatives of the testator, yet the debt is still assets in his hands in favor both of creditors and legatees.(g)

The taking out letters of administration by a debtor to his creditor,

(x) *Burbridge v. Manners*, 3 Camp. 193.

(y) *Dod v. Edwards*, 2 C. & P. 42, E. C. L. R. vol. 12.

(z) *Wentworth*, Off. Exors. c. 2; Com. Dig. Adminis. B. 5.

(a) *Bro. Ab. Exor.* p. 118; *Fryer v. Gildridge*, Hob. 10; *Cheetham v. Ward*, 1 Bos. & Pul. 630; *Wankford v. Wankford*, 1 Salk. 299.

(b) 2 Rol. Abr. 412; *Clayton v. Kynaston*, 2 Salk. 574; 2 Saund. 47, t.

(c) *Bro. Exors.* pl. 114; *Went. Off. Exors.* c. 2, pp. 74, 75, 14th ed.; Com. Dig. Adminis. B. 5; *Wankford v. Wankford*, 1 Salk. 299, by *Powel, J.*; *Cheetham v. Ward*, 1 Bos. & Pul. 630.

(d) *Wankford v. Wankford*, 1 Salk. 299; *Went. c. 2*; Com. Dig. Adminis. B. 5.

(e) *Wankford v. Wankford*, 1 Salk. 299; but see *Abram v. Cunningham*, 1 Vent. 303; *Butler's Co. Litt.* 264, b.

(f) *Bac. Ab. Exors.* A. 10; *Dorchester v. Webb*, Cro. Car. 372; *W. Jones*, 345, S. C.; 1 Salk. 305; *Alston v. Andrew*, Hutton, 128.

(g) *Bac. Ab. Exors.* A. 10; *Brown v. Selwyn*, Cases temp. Talbot, 241, 242; *Holiday v. Boas*, 1 Rol. Abr. 920; *Woodward v. Lord Dacy*, Plowd. 186; *Dorchester v. Webb*, Cro. Car. 373; *Shep. Touchstone*, 497-8; *Wankford v. Wankford*, 1 Salk. 299. See *Wentworth*, Off. Exors. c. 2.

is merely a suspension of the legal remedies as between the parties: but being the act of the law, and not the act of the intestate, it is no extinguishment of the debt, for the action will revive when the affairs of the intestate and of *the administrator are no longer in the hands of the same person. *(h)* [*43]

If a note or a bill be made or indorsed to an executor as executor, he may sue on it in his representative capacity, and join counts on promises to the testator; *(i)* and a note given to the executor for a debt due to the testator will go to the administrator *de bonis non*: *(k)* though a payment of the amount of the instrument to the administrator of the executor would be good in equity, and perhaps at law. *(l)* After considerable conflict, the rule of law is now firmly established, that whenever the money sought to be recovered is assets, the executor may sue, as executor, on a contract made with himself in his representative capacity, and join counts on promises to his testator. *(m)* *(1)* Thus, to counts on a bill or note given to his testator, he may join a count for money paid by himself as executor; *(n)* a count for goods sold by himself, *(o)* for work done by himself, *(p)* a count on an account stated with the plaintiff as executor, of moneys due to the testator; *(q)* or a count on an account stated with the plaintiff as executor, of moneys due to himself as executor. *(r)*

(h) Sir John Nedham's case, 8 Coke, 135; Wankford v. Wankford, 1 Salk. 299; Wentworth, Off. Exors. c. 2; Lockier v. Smith, 1 Sid. 79; 1 Keb. 313, S. C.; Hudson v. Hudson, 1 At. 461.

(i) King v. Thom, 1 T. R. 487.

(k) Catherwood v. Chabaud, 1 B. & C. 150, E. C. L. R. vol. 8; 2 Dowl. & R. 271; Court v. Partridge, 7 Price, 591.

(l) Barker v. Talcot, 1 Vern. 473; and see the remarks of Lord Tenterden on this case, in Catherwood v. Chabaud, 1 B. & C. 150, E. C. L. R. vol. 8; 2 Dowl. & R. 271.

(m) 2 Wms. Saunders, 117, d.

(n) Ord v. Fenwick, 3 East, 104. As to money lent, see Webster v. Spencer, 3 B. & Ald. 365, E. C. L. R. vol. 5.

(o) Cowell v. Watts, 6 East, 405; 9 Smith, 410, S. C.

(p) Marshall v. Broadhurst, 1 C. & J. 403; * Edwards v. Grace, 2 M. & Wels. 190; * 5 Dowl. 302, S. C.

(q) Jobson v. Forster, 1 B. & Ad. 6, E. C. L. R. vol. 20.

(r) Dowbiggin v. Harrison, 9 B. & C. 666, E. C. L. R. vol. 17; 4 Man. & R. 622, S. C.

(1) An executor or administrator may join in the same declaration, counts or promises to himself, with counts or promises to the intestate or testator; the rule being that counts may be joined, whenever the money, if recovered, would be assets. Fry v. Evans, 8 Wendell, 530.

When an action on a bill or note is brought, not by an executor or administrator, but by one who derives a title through an executor or administrator, the plaintiff need not make proof of the probate or letters of administration.(s)

An executor cannot complete his testator's indorsement by delivering the instrument.(t)

It is conceived that an indorsement by one of several co-executors, in his own name alone, will not suffice to transfer the property in a bill of exchange,(1) although it be an indorsement *in fact, [*44] for forgery of which an indictment may be sustained.(u)

An executor, like an agent, is personally liable on making, drawing, indorsing, or accepting, negotiable instruments, though he describe himself as executor, unless he expressly confine his stipulation to pay out of the estate.(v)(2)

In an action against an executor, on a bill or note of his testator, a count for money had and received by defendant, as executor, cannot

(s) *Rawlinson v. Stone*, 3 Wils. 1; 2 Str. 1260, S. C.

(t) *Bromage v. Lloyd*, 1 Exch. Rep. 32.*

(u) *Winterbottom's case*, 1 Dennison's C. C. 51; 2 Car. & Kir. 37, E. C. L. R. vol. 61, S. C. It has been so held in America. *Smith v. Whiting*, 9 Mass. Rep. 320.

(v) *Child v. Monins*, 2 B. & B. 460, E. C. L. R. vol. 6; 5 Moo. 281; *King v. Thom*, 1 T. R. 489; *Ridout v. Bristow*, 1 Tyrw. 90; 1 C. & J. 231,* S. C.; *Serle v. Waterworth*, 4 M. & W. 9;* 6 Dowl. 684, S. C.; *Nelson v. Serle*, 4 M. & W. 795.*

(1) One of several executors may assign a note belonging to the estate of the testator as collateral security for a judgment obtained against the estate; and his act will bind his co-executors. *Wheeler v. Wheeler*, 9 Cowen, 34. But aliter when the note is made to the executors as such. *Smith v. Whiting*, 9 Mass. 334.

(2) Administrators, giving a note for the debt of their intestate, are not personally liable therefor, unless they have assets, or forbearance was the consideration of the note. *Bank of Troy v. Tapping*, 9 Wendell, 273. Such a note, prima facie, imports a sufficiency of assets; the defendant may, however, show that in part there was a deficiency of assets, and the *onus probandi* rests on him. *Bank of Troy v. Topping*, 13 Wendell, 557; and see *Sleighter v. Harrington*, 2 Taylor, 249, 2 Murphy, 250; *Sims v. Stilwell*, 3 Howard (Miss.), 176; *Byrd v. Holloway*, 6 Smedes and Marshall, 473; *Rucker v. Wadlington*, 5 J. J. Marshall, 238; *Steele v. McDowell*, 9 Smedes and Marshall, 193.

be joined;(*w*) nor a count for money lent to the executor;(*x*) nor a count for goods sold to the executor, or work done for him.(*y*) A count for money paid to the use of the executor probably may.(*z*) A count on an account stated by the executor, of moneys due by the testator,(*a*) may be joined; and so may an account on an account stated by the executor, of moneys due from him as executor.(*b*) Wherever the judgment on a common count is *de bonis testatoris*, the count may be joined; but where the judgment is *de bonis propriis*, it cannot.(*c*)(1)

An infant can make a binding contract for necessities only; and he may give a single bill (which is a bond without a penalty) for the exact sum due for necessities, but not a bond with a penalty, or carrying interest.(*d*)

What are to be considered necessities(*e*) depends on the rank and circumstances of the infant in the particular case.(2)

(*w*) *Jennings v. Newman*, 4 T. R. 347; *Ashby v. Ashby*, 7 B. & C. 444, E. C. L. R. vol. 14; 1 Man. & R. 180, E. C. L. R. vol. 17, S. C.

(*x*) *Rose v. Bowler*, 1 Hen. Bla. 108.

(*y*) *Corner v. Shew*, 3 M. & Wels. 350; * *Kitchenman v. Skell*, 3 Ex. Rep. 49.*

(*z*) *Ashby v. Ashby*, 7 B. & C. 444, E. C. L. R. vol. 14; 1 Man. & R. 180.

(*a*) *Secar v. Atkinson*, 1 H. Bla. 102.

(*b*) *Powell v. Graham*, 7 Taunt. 581, E. C. L. R. vol. 2; 1 Moo. 305; *Ashby v. Ashby*, 7 B. & C. 444, E. C. L. R. vol. 14; 1 Man. & R. 180.

(*c*) See 2 Wms. Saund. 117, c.

(*d*) Co. Litt. 172, a., u. 2; *Russell v. Lee*, 1 Lev. 86; and, therefore, a bond cannot be set up by a promise to pay made after full age, and the replication of such promise is ill. *Baylis v. Dineley*, 3 M. & Sel. 477; see B. N. P. 182; *Hunter v. Agnew*, 1 Fox and Smith, 15; 1 Rol. Ab. 729; *Fisher v. Mowbray*, 8 East, 330. A bond with a penalty given by an infant seems to be absolutely void. *Ayliffe v. Archdale*, Cro. Eliz. 920; Vin. Ab. Actions, D. d.

(*e*) See the observations of the Court in a very singular case, *Chappell v. Cooper*, 13 M. & Wels. 252.*

(1) In an action against an executor, a count or a promise made by him as such, and in which he is not charged as personally liable, may be joined with a count or a promise by the deceased. *Howard v. Powers*, 6 Hammond, 92; *Carter v. Phelps*, 8 Johns. 440.

An indorsement upon a note by the testator will support an alleged promise by his executors in a special count against them. The law implies a promise on their part. *Barnes v. Reynolds*, 4 Howard (Miss.), 114.

In an action against administrators on a note made by their intestate, if the declaration allege a promise by the deceased and also by the administrators, though informal, it is not bad on general demurrer. *Curtis v. Bowrie*, 2 McLean, 374.

(2) An infant can never bind himself, even for necessities, when he has a parent or guardian who supplies his wants. *Guthrie v. Murphy*, 4 Watts, 80; *Angel v.*

All his other contracts are distinguishable into two sorts, *voidable* [*45] *and *void*. A distinction usually of importance: first, because a voidable contract may be afterwards affirmed, but a contract absolutely void is incapable of confirmation: and, secondly, because a void contract may be treated by all parties as a nullity, but contracts voidable can only be avoided by the contracting party himself. Yet the precise criterion of this distinction is not in the case of infancy clearly settled. According to some authorities it depends entirely on the *mode* of the transaction; and all such gifts, grants, or deeds of an infant, as take effect by the delivery of his hand, are only voidable; whereas such as do not so take effect are void.^(f) According to others, if the act be for the advantage of the infant, it is voidable: if for his disadvantage, absolutely void.^(g)

The acceptance of an infant is invalid,^(h) and cannot be confirmed by a promise to pay made after he is of age, and *after* action brought.⁽ⁱ⁾ And all his contracts made in the course of trade were formerly considered absolutely void, and incapable of confirmation, though the moral obligation to fulfil them would support an express promise to pay after full age, and before action brought;^(k) and it

(f) Perkins, 12.

(g) Zouch v. Parsons, 3 Bur. 1794, recognized as law by Lord Eldon in — v. Hancock, 17 Ves. jun. 383; and see Holt v. Ward, 2 Stra. 937; Williams v. Moore, 11 M. & W. 256.*

(h) Williamson v. Watts, 1 Camp. 552; and see Williams v. Harrison, Carthew 160; 3 Salk. 197, S. C.

(i) Thornton v. Illingworth, 2 B. & C. 824, E. C. L. R. vol. 9; 4 Dowl. & R. 545, S. C.

(k) Ibid.; Hunt v. Massey, 5 B. & Ad. 902, E. C. L. R. vol. 27; 2 Nev. & M. 109, S. C. Whether a ratification be in all cases a new contract, resting on the

McLellan, 16 Mass. 28; Kline v. L'Amoureux, 2 Paige, 419; Perrin, v. Wilson, 10 Missouri, 451.

But when he has authority from his guardian, either express or implied, he may purchase necessities, or when they are supplied to him by a third person under these circumstances, the infant is bound. Rundel v. Keeler, 7 Watts, 237; Watson v. Heasel, 7 Watts, 344; see Grace v. Hale, 2 Humph. 27.

The question whether articles are necessary or not, is one of fact, to be determined by the jury and not by the court. Bent v. Manning, 10 Vermont, 225. It is a mixed question of law and fact; but where there has manifestly been an excessive supply, the court may pronounce upon it. Johnson v. Lines, 9 Watts & Serg. 80.

A collegiate education is not ranked among those necessities for which an infant can render himself absolutely liable by contract. Middleburg College v. Chandler, 16 Vermont, 683. The board of an infant is included among the necessities for which he may pledge his credit. Bradley v. Pratt, 23 Vermont, 378.

has been held that no mere acknowledgment, or part payment, would, under such circumstances, create a liability.^(l) But it now seems that an infant's contract on a bill or note is voidable only, and that his liability may be established by ratification after full age.^(m)⁽¹⁾

original obligation as a moral consideration, or whether it merely impart validity to the original promise, has been considered doubtful. *Williams v. Moore*, 11 M. & W. 256 ;* but see *Harris v. Wall*, 1 Ex. Rep. 122.*

(l) *Thrupp v. Fielder*, 2 Esp. 628.

(m) *Harris v. Wall*, 1 Ex. Rep. 122.*

(1) A negotiable note made by an infant is voidable and not void ; and if he, after coming of age, promise the payee that it shall be paid, the payee may negotiate it and the holder may maintain an action in his own name against the maker. *Reed v. Batchelder*, 1 Metc. 559 ; *Everson v. Carpenter*, 17 Wend. 419 ; *Best v. Givens*, 3 B. Monroe, 72 ; *Goodsell v. Myers*, 3 Wend. 479 ; *Stokes v. Brown*, 4 Chandler, 39.

A promissory negotiable note, executed by an infant, is not void so as to be incapable of ratification after the infant becomes of age ; and a re-promise by him is valid, though not made until after the commencement of the suit against him. After the infant became of age, he wrote a letter to the plaintiff containing these words, "All that is justly your due shall be paid." Held that this was a sufficient re-promise, and that the legal presumption that claims are just and also due, after the usual evidence in support of them, is sufficient, till rebutted by other evidence of injustice or of payment. *Wright v. Steele*, 2 N. Hamp. 51 ; *Font v. Cathcart*, 8 Alabama, 725. An infant made a note, and after age, on payment being demanded, said, "I will pay it as soon as I can make it ; but I cannot do it this year. I understand the holder is about to sue it, but she had better not." This was held to be an affirmation of the contract, and that an action would presently lie. *Babo v. Hannels*, 2 Bailey, 114. When an infant on being applied to for the payment of a note made by him during infancy, acknowledged that the money was due, and promised that, on his return to his home, he would endeavor to procure it and send it to his creditor, it was held to be a sufficient ratification of the original promise. *Whitney v. Dutch*, 14 Mass. 457. The declaration of an infant after he arrives of age, of his intention to pay a note, accompanied with his authorizing an agent to pay it, is a sufficient confirmation of the contract to bind him, although the agent has not done anything. *Orvis v. Kimball*, 3 N. Hamp. 314. An infant purchased a kettle and other articles, and gave his promissory note for them, it being agreed by the parties, that he might try the kettle and return it if it did not answer. The vendor, after the infant became of age, requested him to return it, if he did not intend to keep it ; but he retained and used it, with the other property, a month or two afterwards. Held, that this was a sufficient ratification of the contract, and that an action might be sustained on the note. *Aldrich v. Grimes*, 10 N. Hamp. 194. In an action on a note of an infant, the evidence of ratification was that the defendant said that he knew but little about the matter, as the transaction had been mostly managed by another person ; that he thought the note had been paid or partly paid ; and that his uncle would be there next month, and then it should be settled ; it was held sufficient to be submitted to a jury. *Bay v. Gunn*, 1 Denio, 108. An infant purchased land

The stat. 9 Geo. 4, c. 14, enacts, that no action shall be maintained whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith. Oral evidence may supply defects in the written ratification as to the sum, the date, and [*46] the person *to whom it is addressed.(n) A person of full age, who accepts a bill drawn while he was an infant, is liable on

(n) *Hartley v. Wharton*, 11 Ad. & El. 934, E. C. L. R. vol. 39.

and gave his note for the price. After he came of age he continued in possession of the land and promised to pay the note. Held, that this was a confirmation of the contract, binding on him and his representatives. *Armfield v. Tate*, 7 Iredell, 258.

The retention of the consideration for which the note of an infant was given, after his coming of age, is not a ratification of the note; neither is a submission to arbitration of the question whether he is liable on the note, after he comes of age, a ratification. *Benham v. Bishop*, 9 Conn. 330. Where a defendant, in conversation concerning a note made by him during infancy, said that he owed the plaintiff, but was unable to pay him; and that he would endeavor to procure his brother to be bound with him; it was held not to be a renewal of the promise. *Ford v. Phillips*, 1 Pick. 202. A person who gave a note during his infancy, after he became of age made declarations of an intention of payment, to persons having no interest in or agency as to the note. Held, that this was no evidence of a promise of payment or ratification of the contract. *Hoit v. Underhill*, 9 N. Hamp. 436. A new promise, made by an infant after he comes of age, that he will pay his promissory note, will not bind him, if made to one who is attorney for the plaintiff in another suit, but had not then been employed in the present suit against the infant. *Bigelow v. Grannis*, 2 Hill, 120.

A plea of infancy, by one member of a firm, to an action on a note in the name of the firm, is not avoided by a replication that the defendant had continued a partner of the firm for upwards of a year after his arrival at full age, and had not in that time, nor for years afterwards, indicated a disposition to disaffirm any note executed in the name and in the business of the firm, without an averment that he had knowledge of the note declared on, and was looked to for payment. *Crabtree v. May*, 1 B. Monroe, 289.

A confirmation must be distinct, and with the knowledge that he is not liable on the contract. A mere acknowledgment of a debt, or a payment of part of it, will not support an action on such a contract. *Hinely v. Margaritz*, 3 Barr, 428; *Norris v. Vance*, 3 Richardson, 164; *Smith v. Mayo*, 9 Mass. 62; *Martin v. Mayo*, 10 Mass. 137; *Whitney v. Dutch*, 14 Mass. 457; *Ford v. Phillips*, 1 Pick. 202; *Barnaby v. Barnaby*, 1 Pick. 221; *Thompson v. Lay*, 4 Pick. 48; *Wilcox v. Routh*, 12 Conn. 550; *Curtis v. Patton*, 11 Serg. & Rawle, 305; *Aldrich v. Grimes*, 10 N. Hamp. 194; *Hoit v. Underhill*, 9 N. Hamp. 436, 10 N. Hamp. 220; *Bigelow v. Grannis*, 2 Hill, 120; *Alexander v. Hutchinson*, 2 Hawks, 535; *Millard v. Hewlett*, 19 Wendell, 301; *West v. Penny*, 16 Alabama, 186.

the bill.(o) But it is conceived that a bill drawn, indorsed, or accepted in blank by an infant, and filled up without his express consent after he is of full age, will not bind him.(p)

Whether a promissory note, given by an infant for necessities, be valid, either at the suit of the original payee, or his indorsee, has never been expressly decided; but, it should seem, it is not.(q)(1) An

(o) *Stevens v. Jackson*, 4 Camp. 164.

(p) *Hunt v. Massey*, 5 B. & Ad. 902, E. C. L. R. vol. 27; 2 Nev. & M. 109, S.C.

(q) *Trueman v. Hurst*, 1 T. R. 40; *Bayley*, 19; *Williamson v. Watts*, 1 Camp. 552. In the United States it has been decided that a promissory note given for necessities is void. *Swasey v. Vanderheyden*, 10 Johns. Rep. 33; *Nightingale v. Withington*, 15 Massey's Rep. 272. So in the French law, *Pardessus*, 2, 459.

(1) It will be seen by the cases thrown together in the preceding note, that the general doctrine of the American Courts is, that the bill or note of an infant is not void, but voidable only, and therefore, capable of ratification after his arrival at full age. The decisions, however, are not harmonious upon the question; whether a negotiable bill or note for necessities falls within the same category, or is to be considered as absolutely binding without such ratification, as a single bill for necessities not negotiable undoubtedly is. It seems very clear that, when the security is of such a nature that, by the rules of law, the consideration cannot be inquired into, then the infant is not liable. In the hands of the payee, however, it may be inquired into, and it would seem necessarily in the hands of the indorsee. Infancy is, *prima facie*, a good defence, and as the holder must in answer prove the consideration to be necessities, that throws open the whole question for the benefit of the infant. Upon these grounds it has been determined in South Carolina, that such a note is valid. *Dubose v. Wheddon*, 4 McCord, 221; *Haine's Adm. v. Tanant*, 2 Hill, 400. See *Bouchell v. Clary*, 3 Brevard, 194. So also in Massachusetts, in which it has been held, that in a suit upon a note given by an infant, the plaintiff may show that it was given in whole or in part for necessities; and may recover thereon as much as the necessities for which it was given were reasonably worth, and no more. *Earle v. Reed*, 10 Metcalf, 387. The contrary has been held in New York, on the English authorities, which go upon the ground, that in the hands of a bona fide holder, the infant would be precluded from questioning the consideration. *Swasey v. Vanderheyden's Adm.*, 10 Johns. 33. In Kentucky it has been decided, that the note of an infant has no obligatory force as such, and in an action on the note it is necessary to show that the articles furnished as the consideration of the note were necessities. *Beeler v. Young*, 1 Bibb, 519. The reasoning in favor of holding such a note voidable, appears to run in a circle, and therefore to be unsound. A note may be valid as such, though not negotiable—in other words, though it may be so circumstanced as to let in all inquiries as to its consideration in the hands even of a bona fide holder. So here, on proof that the maker is an infant, the negotiability of the note is at an end: but it does not cease to be a note. It may be sued on by the holder in his own name. He stands in the shoes of the original payee, and can recover whatever he would have been entitled to recover. If the note is voidable, then without ratification it cannot be sued on at all. The holder at most must be subrogated to the rights of the original payee, in an action against

infant is not bound by an account stated, in respect even of necessities.(r) But he may, after he becomes of age, ratify an account stated.(s)

If an infant be a party, jointly with an adult, to a negotiable instrument, the owner may sue the adult alone, without taking notice of the infant.(t)

Where an infant is partner in a firm, unless on coming of age he notifies the discontinuance of the partnership, he is liable for contracts made by the firm after his majority.(u)

Where an infant is not liable on a contract, he cannot be made liable by suing him in an action in form *ex delicto*.(v)(1)

An infant drawing and indorsing bills may convey a title to the indorsee, so that the indorsee can sue the acceptor and all other parties, except the infant himself;(w) but the infant may avoid the contract, except where the acceptor has estopped himself by admitting (as we shall see he does) the capacity of an infant drawer to indorse.(x)(2)

(r) *Trueman v. Hurst*, 1 T. R. 40; *Bartlett v. Emery*, Ibid. 42 n.; *Ingledew v. Douglas*, 2 Stark. 36, E. C. L. R. vol. 3.

(s) *Williams v. Moor*, 12 L. J., Exch. 253; 11 M. & W. 256,* S. C.

(t) *Burgess v. Merrill*, 4 Taunt. 468; *Chandler v. Parkes*, 3 Esp. 76, n.

(u) *Good v. Harrison*, 5 B. & Ald. 147, E. C. L. R. vol. 7.

(v) *Gröve v. Neville*, 1 Keb. 778; *Johnson v. Pye*, 1 Keb. 905-913; 1 Lev. 169, S. C.; *Mandy v. Scott*, 1 Sid. 109; *Jennings v. Rundall*, 8 T. R. 335; and see *Cranch v. White*, 1 Bing. N. C. 417, E. C. L. R. vol. 27; 1 Scott, 314, S. C.

(w) *Taylor v. Croker*, 4 Esp. 187; *Nightingale v. Withington*, 15 Mass. American Rep. 272; and see *Drayton v. Dale*, 2 B. & C. 299, 302, 9th ed., E. C. L. R. vol. 9; 3 Doug. 65, S. C.; *Grey v. Cooper*, 1 Selw. N. P.; 3 D. & R. 534, S. C., E. C. L. R. vol. 16; *Jones v. Dank*, 4 Price, 300; *Jeune v. Ward*, 2 Stark. 330; 1 B. & Ald. 653, S. C.; see post, Chapter on *Acceptance*.

(x) See Chapter on *Acceptance*.

the infant in the name of the payee, on a declaration founded on the original consideration. It is evident that the Kentucky case can only be supported on this footing, and contrary to its own syllabus, it really affirms that the note is valid as a note, though it is not a negotiable note. See *McMinn v. Richmonds*, 6 Yerger, 9.

(1) Where a contract is the substantive ground of action against an infant, the plaintiff cannot sue in tort. *Wilt v. Welsh*, 6 Watts, 9. An infant is not liable for a fraud in a contract which he is incapable of making. *Brown v. Durham*, 1 Root, 273; *West v. Moore*, 14 Verm. 447; *Wallace v. Morss*, 5 Hill, 391; *Morrill v. Aden*, 19 Vermont, 505. But trover will lie against an infant for goods which came into his hands by means of an illegal contract. *Vasse v. Smith*, 6 Cranch, 226; *Lewis v. Littlefield*, 3 Shepley, 233; *Fitts v. Hall*, 9 N. Hamp. 441; *Towne v. Wiley*, 23 Vermont, 355.

(2) An infant may, for a valuable consideration, indorse a negotiable promissory note or bill of exchange, so as to transfer the property to an indorsee. *Nightingale v. Withington*, 15 Mass. 272.

*An infant may sue on a bill.(y) But payment should be made to his guardian, yet payment to the infant may, under [*47] some circumstances, be good.(z)

An infant is not estopped by his own representations.(a)

It is a general rule of universal law, that the contracts of a lunatic, an idiot, or other person non compos mentis, from age or personal infirmity, are utterly void.(b) And the old authorities in the English law, that a man cannot be allowed to stultify himself by alleging his own lunacy, are shaken by the modern decisions.(c)

But it had been before held, that if a note be made by a lunatic or person of imbecile mind, known to be so by the payee, it is a fraud in the payee, and the note is void even in the hands of an indorsee, at least if there be anything unusual on the face of the note.(d) So, if the consideration be executory merely, it was said that it might perhaps be void, though the party dealing with the lunatic were not cognizant of his infirmity.(e) But it was held, that a defendant could not set up his own insanity as a defence, unless it were known and taken advantage of by the plaintiff, so that there was a fraud in him.(f) And it still seems that in order to avoid a contract for lunacy it must be known to the other contracting party.(g)(1)

(y) Chitty, 20; Warwick v. Bruce, 2 M. & Sel. 205; Holliday v. Atkinson, 5 B. & C. 501, E. C. L. R. vol. 11; 8 D. & C. 163, S. C. (z) Bayley, 255.

(a) Cannam v. Farmer, 2 Exch. Rep. 598.*

(b) *Furius nullum negotium gerere potest, quia non intelligit quid agit.* Inst. Lib. 3, tit. 20, s. 8; Dig. Lib. 50, tit. 1, 5, 40, 124.

(c) Kent's Comm. 451; and see the observations of Parke, B., in Gore v. Gibson, 13 M. & W. 623;* and Alcock v. Alcock, 3 M. & G. 268, E. C. L. R. vol. 42.

(d) Sentence v. Poole, 3 C. & P. 1, E. C. L. R. vol. 14; Baxter v. Lord Portsmouth, 2 C. & P. 178, E. C. L. R. vol. 12; 5 B. & C. 170, E. C. L. R. vol. 11; 8 Dowl. & R. 614, S. C. (e) Ibid.

(f) Brown v. Joddrell, 1 M. & M. 105, E. C. L. R. vol. 22; 3 C. & P. 30, E. C. L. R. vol. 14, S. C.; Levy v. Baker, 1 M. & M. 106, E. C. L. R. vol. 22; but see Gore v. Gibson, 13 M. & W. 623.* In Putnam v. Sullivan, 4 Massachusetts American Reports, 45, it is said by Parsons, C. J., that, "perhaps, if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him, he would not be liable as indorser, because he is not guilty of any laches." It is, however, conceived that he must plead the fraud specially.

(g) Molton v. Camroux, 4 Ex. Rep. 19.*

(1) Sanity is to be presumed, and the burden of proof is on the party denying it. But after a general derangement has been shown, the burden is upon the other party to show the sanity at the time of doing a particular act. Jackson v. Van

Imbecility of mind cannot be proved under a plea that defendant did not make a promissory note.^(h)

It was formerly held, that a man could not protect himself from [*48] *any deed or agreement by pleading drunkenness, unless he also showed, that the drunkenness was brought about by the management and contrivance of him who procured the deed or contract.⁽ⁱ⁾ And this may still be the law in a case of *partial* drunkenness.⁽¹⁾

(h) *Harrison v. Richardson*, 1 Mood. & Rob. 504.

(i) *Johnson v. Medlicotte*, 3 P. Wms. 130 ; *Cooke v. Clayworth*, 18 Vesey, 12.

Dusen, 5 Johns. 144. To set aside promissory notes on the ground of mental incapacity, it is not necessary to prove partial derangement. It is sufficient if there appears such weakness of mind as to incapacitate the party to guard himself against imposition and undue influence. *Johnson v. Chadwell*, 8 Humph. 145.

An inquisition of lunacy is not conclusive against any person not a party to it. *Den v. Clarke*, 5 Halst. 217. It is, however, not only *prima facie* evidence of lunacy, but amounts to full proof until overpowered. *Rogers v. Walker*, 6 Penna. State Rep. 371.

The acts of a lunatic before office found are not void but voidable. *Jackson v. Gúmaer*, 2 Cowen, 552. After office found they are void. *Pearl v. McDowell*, 3 J. J. Marsh. 658.

In trover for a promissory note pledged to P. by S. when he was insane, it is no defence that P. did not know of, nor have any reason to suspect, the insanity, and acted *bona fide*. *Seaver v. Phelps*, 11 Pick. 304.

An executed contract by a merchant for the purchase of goods, before the day from which the inquest find him to have been non compos, cannot be avoided by proof of insanity at the time of the purchase, unless there has been a fraud committed on him by the vendor, or he has knowledge of his condition. *Beals v. See*, 10 Barr, 56. The executed contract of a non compos mentis for necessities *bona fide* supplied, stand on the footing of an infant's contract for necessities. Therefore the executor of a lunatic is liable for necessities furnished to his testator, while non compos mentis before a commission issued, and after the issuing of the commission and before the appointment of a committee. *La Rue v. Gilkyson*, 4 Barr, 375. So a lunatic is bound for medical or surgical services administered to his wife. *Pearl v. McDowell*, 3 J. J. Marshall, 658 ; *Fitzgerald v. Reed*, 9 Smedes & Marshall, 94. Contracts with lunatics are not all absolutely void, but such as are fairly made with them for necessities, or things suitable to their condition and habits of life, will be sustained. *Richardson v. Strong*, 13 Iredell, 106.

(1) Mental incapacity at the time of contracting, produced by drunkenness or any other cause, is a good defence against a contract, whether by deed or parol. *Jenners v. Howard*, 6 Blackf. 240.

Whenever a man loses his memory and understanding, he is entitled to legal protection, whether such loss is occasioned by his own imprudence or misconduct, or by the act of Providence. *Bliss v. The Railroad*, 24 Vermont, 424.

A note given by one incapable to contract from drunkenness, is not merely

But where there is *total* drunkenness the modern decisions have qualified the old doctrine. Total drunkenness, producing a complete, though temporary, suspension of reason, is of itself a defence to an action on a bill or note.^(k) "It is just the same," says Alderson, B., "as if the defendant had written his name on the bill in his sleep in a state of somnambulism."^(l)

But as an answer to an action on a bill or note, drunkenness must be specially pleaded.^(m)

The contracts of a married woman are void in law.

Without authority from her husband, therefore, she cannot at law charge either him or herself, by making, drawing, accepting, or indorsing, negotiable instruments;⁽ⁿ⁾ not even if she live apart from him, and have a separate maintenance secured by deed.^(o) Nor after a valid divorce, *à mensa et thoro*;^(p) though it is otherwise after a complete divorce, a *vinculo matrimonii*, which annuls the marriage to all purposes. And even if she be a sole trader in London, by the custom of the city, she is not liable at all in the superior Courts, and in the city Courts her husband must be joined for conformity, though execution will be against the wife alone.^(q) (1)

(k) At least by a person who had notice. *Molton v. Camroux*, 2 Ex. Rep. 487; * 4 Ex. Rep. 17, * S. C.

(l) *Gore v. Gibson*, 13 M. & W. 623.* Marriages have been set aside on this ground. *Browning v. Reane*, 2 Phil. 69.

(m) *Ibid.*

(n) She cannot, like an infant, convey a title to third persons. *Barlow v. Bishop*, 1 East, 432; 3 Esp. R. 266, S. C.

(o) *Marshall v. Rutton*, 8 T. R. 545. In one case the Court of C. P. refused to discharge out of custody a married woman, who had been arrested as the drawer of a bill of exchange. *Jones v. Lewis*, 7 Taunt. 54, E. C. L. R. vol. 2; 2 Marsh. 385, S. C.

(p) *Lewis v. Lee*, 3 B. & C. 291, E. C. L. R. vol. 10; 5 D. & R. 90, S. C.

(q) *Beard v. Webb*, 2 B. & P. 93.

voidable but void, and is incapable of confirmation by the subsequent conduct of the maker. *Barkeley v. Cannon*, 4 Richardson, 136.

(1) A promissory note made by a married woman during coverture is void, and a promise to pay the same made by her after her husband's death, without any new consideration moving her thereto, will not support an action against her. *Vance v. Wells*, 6 Alabama, 737.

Where the wife purchased goods without the knowledge of her husband, and gave

Nor can a married woman be estopped by her own representation that she is discovert.(*r*) But an acceptor may be estopped from disputing her competency.(*s*)

But if a married woman have a separate estate, and make a promissory note, or accept a bill of exchange, she is liable in equity.(*ss*)

[*49] *And if, while she has a separate estate, she gives a security for money lent, and after her husband's death promise to repay it, such promise is binding at law on herself and her executors.(*t*) But if at the time the note was given she had not a separate estate, no such promise, after the death of her husband, will be valid.(*u*)

And, if the husband has been transported, and is not returned to this kingdom, whether or no the term of his transportation be expired;(v) or if he be an alien, and never was within the kingdom;(w) or if her husband has been abroad, and not heard of for seven years, after which period the legal presumption of his death arises:—in any one of these three cases she is liable in law for her contracts, as a single woman.(1) Where the husband was transported for fourteen years, but instead of going abroad he was confined in the hulks at Portsmouth, it was held that his wife, carrying on business in her own name, for the benefit of the family, might be made bankrupt, and

(*r*) *Cannam v. Farmer*, 3 Ex. Rep. 698.*

(*s*) See the Chapter on *Acceptances*.

(*ss*) *Bullpin v. Clarke*, 17 Ves. 366; *Hulme v. Tenant*, 1 Bro. C. C. 16; *Stewart v. Kirkwall*, 3 Madd. 387. Query, where there is a restraint on anticipation.

(*t*) *Lee v. Muggeridge*, 5 Taunt. 36, E. C. L. R. vol. 1.

(*u*) *Lloyd v. Lee*, 1 Stra. 94; *Littlefield v. Shee*, 2 B. & Ad. 811, E. C. L. R. vol. 22.

(*v*) *Carrol v. Blencow*, 4 Esp. 27; *Sparrow v. Carruthers*, cited 2 W. Bla. 1197, and more fully 1 T. R. 7. See *Derry v. Duchess of Mazarine*, 1 Ld. Raym. 147.

(*w*) *Kay v. Duchess de Pienne*, 3 Camp. 123.

her note for them, the husband was held not to be liable. *Moses v. Fogartie*, 2 Hill, (South Carolina), Rep. 335.

A wife may be agent for her husband, though they keep separate stores, and bind him by notes signed in her own name. *Abbott v. Mackinley*, 2 Miles, 220.

If a husband give his wife authority to give notes, the notes, to be binding on the husband, must purport on their face to have been given by the wife, as agent or on the behalf of the husband. *Minard v. Mead*, 7 Wend. 68.

(1) A feme covert is not liable on a note executed by herself, even though her husband has been absent in another state for many years. *Chouteau v. Merry*, 3 Missouri, 254, 2d ed. 182.

that a bill accepted by her under such circumstances, constituted a good petitioning creditor's debt.(x)

Where a bill or note is given to a single woman, and she marries, the property vests in her husband, and he alone can indorse it;(y) and husband and wife *must* join in the action upon it;(z) but if payable to order, marriage may operate as an indorsement, so as to enable the husband to sue alone.(a) If not recovered upon, or reduced into possession during their joint lives, it reverts to the woman, if she survive, or goes to the husband as her administrator, if he survive.(b)(1)

If the note be made to the woman *after marriage*, the interest vests in the husband; he alone can indorse it.(c) But if the husband die *without a recovery on it, or reducing it into possession, the note belongs, at law, to the wife, and not to the [*50]

(x) *Ex parte Franks*, 7 Bing 762, E. C. L. R. vol. 20.

(y) *Connor v. Martin*, 3 Wilson, 5; 1 Stra. 516, S. C.

(z) *Com. Dig. Baron & Feme*, N.

(a) *Mac Neillage v. Holloway*, 1 B. & Ald. 218. As to some observations of Lord Ellenborough in this case, see the judgment of the Court of Queen's Bench, in *Hart v. Stephens*, 14 L. J. 149, Q. B.; 6 Q. B. Rep. 943, E. C. L. R. vol. 51, S. C.

(b) *Co. Litt.* 351, b.; *Coppin v. —*, 2 P. Wms. 497; *Day v. Padrone*, 2 M. & S. 396, E. C. L. R. vol. 28.

(c) *Connor v. Martin*, 1 Stra. 516; 3 Wils. 5, S. C.; *Barlow v. Bishop*, 1 East, 433; *Mason v. Morgan*, 2 Ad. & Ellis, 30, E. C. L. R. vol. 29; 4 Nev. & M. 46, S. C.; but the wife may convey a title by indorsing in her husband's name, by his authority; *Ibid.* And under her husband's authority, she may indorse in her own name. *Prestwick v. Marshall*, 7 Bing. 565, E. C. L. R. vol. 20; 5 M. & P. 513; 4 C. & P. 594, E. C. L. R. vol. 19. And if, after an indorsement in her own name, the acceptor, seeing the bill with the indorsement upon it, promises to pay, that amounts to an admission by the acceptor that the indorsement was by the husband's authority. *Cotes v. Davis*, 1 Camp. 485. Where in an action by the indorsee of a bill against the acceptor, the declaration alleged the bill to have been drawn and indorsed to the plaintiffs by a woman, to which the defendant pleaded that she was married, a replication that she drew and indorsed as the agent of her husband was held no departure and good. *Prince v. Brunatte*, 1 Bing. N. C. 435, E. C. L. R. vol. 27; 1 Scott, 342; 3 Dowl. 382, S. C.

(1) A note made payable to a married woman, is in law a note to the husband, and becomes instantly his property; and her indorsement transfers no property in the note. *Savage v. King*, 17 Maine, 301; *Shuttleworth v. Noyes*, 8 Mass. 229; *Jones v. Warren*, 4 Dana, 333.

A feme covert may indorse in her maiden name, a note which was left her before marriage, provided her husband's assent be given. *Miller v. Delamater*, 12 Wend. 433.

husband's executors, and she must bring the action.(d) If the consideration for the note were the husband's money, it is conceived that the wife would be a trustee for the husband's executors.(e) The wife *may* join in an action on the instrument;(f) but the husband may sue alone.(g) If he sue alone, he lets in, by way of set-off, debts due from himself; if he join his wife in the action, perhaps he lets in, as a set-off, debts due by her *dum sola*.(h)

What amounts to a reduction of the wife's chose in action into possession, is a question of considerable nicety. It is conceived that indorsing a note over is such a reduction.(i) But the bankruptcy of the husband is not a reduction of the wife's choses in action into possession; and therefore the assignees of a bankrupt cannot maintain an action in their own name *alone*, on a promissory note made to the wife of the bankrupt before her marriage.(j) Nor is the receipt of interest by the husband(k) a reduction into possession.(1)

(d) *Betts v. Kimpton*, 2 B. & Ad. 273, E. C. L. R. vol. 22; *Richards v. Richards*, 2 B. & Ad. 447, E. C. L. R. vol. 22; *Gaters v. Madely*, 6 M. & W. 423; * *Hart v. Stephens*, 14 L. J. 148, Q. B.; 6 Q. B. Rep. 937, E. C. L. R. vol. 51, S. C.; *Scarpellini v. Atcheson*, 14 L. J. 333, Q. B.; *Howard v. Oaks*, 18 L. J. 485, Exch.; 3 Exch. Rep. 136, * S. C. See this last case as to the form of pleading. Coverture of the plaintiffs is only pleadable in abatement. *Guyard v. Sutton*, 3 C. B. Rep. 153, E. C. L. R. vol. 54.

(e) *Philliskirk v. Pluckwell*, 2 M. & Sel. 396.

(f) *Philliskirk et Uxor v. Pluckwell*, 2 M. & Sel. 393; *Arnould v. Revout*, 1 B. & B. 443, E. C. L. R. vol. 5; 4 Moore, 70, S. C.

(g) *Burrough v. Moss*, 10 B. & C. 858, E. C. L. R. vol. 21; 5 M. & R. 296, S. C.

(h) *Ibid*.

(i) *Scarpellini v. Atcheson*, 14 L. J. 333, Q. B.; 7 Q. B. Rep. 864, E. C. L. R. vol. 53, S. C.

(j) *Sherrington v. Yates*, in error, 12 M. & W. 855, * reversing *Yates v. Sherrington*, 11 M. & W. 42.*

(k) *Hart v. Stephens*, 6 Q. B. Rep. 937, E. C. L. R. vol. 51.

(1) *Legg v. Legg*, 8 Mass. 99; *Howes v. Bigelow*, 13 Mass. 384; *Stanwood v. Stanwood*, 17 Mass. 57; *Tucker v. Gordon*, 5 N. Hamp. 564; *Hayward v. Hayward*, 20 Pick. 517; *Strong v. Smith*, 1 Metcalf, 476; *Miller's Estate*, 1 Ashmead, 323; *Kintzinger's Estate*, 2 Ashmead, 455; *Killcrease v. Killcrease*, 7 Howard (Miss.), 311; *Taliaferro v. Taliaferro*, 4 Call. 83; *Bell v. Bell*, 1 Kelley, 637; *Clarke v. M'Creary*, 12 Smedes & Marshall, 347. An assignment by a husband of a present interest of his wife in personal property is a sufficient reduction to possession, and passes the property to the assignee. *Browning v. Headley*, 2 Robinson, 340; *Forrest v. Warrington*, 2 Dessausure, 254; *Matheney v. Guess*, 2 Hill. Ch. (S. C.) 63; *Thomas v. Kelsoe*, 7 Monroe, 521; *Rogers v. Bumpass*, 4 Iredell Eq. 385; *Barnes v. Pearson*, 6 Iredell Eq. 482; *Swoyer's Appeal*, 5 Barr, 377; *Siter's Case*, 4 Rawle, 468.

An assignment under an insolvent law, being a voluntary act by the husband,

If a single woman, being a party liable on a bill or note, marries, her husband becomes responsible, and they must be sued jointly.^(l) If (the debt being still unsatisfied) he dies, *she is liable, and [*51] not his executors; if she dies, her representatives are liable, if there be assets, but not her husband, except in his representative capacity.^(m)

When a joint and several promissory note was, during marriage, given to a feme executrix, by her husband and two other persons, it was held, that after her husband's death she might sue the other makers.⁽ⁿ⁾ And, though a note given by a wife to her husband is void, yet, if indorsed over by the husband, it is valid as between the husband and the indorsee.^(o)

Payment of a sum due on a bill or note to a married woman will not discharge the party making it, unless she had authority, express or implied, to receive payment. It should be made to her husband.^(p)⁽¹⁾

By attainder the felon's personal property and choses in action vest in the crown, without office found. The felon, till he has

(l) *Mitchinson v. Hewson*, 7 T. R. 348.

(m) *Ibid*.

(n) *Richards v. Richards*, 2 B. & Ad. 447, E. C. L. R. vol. 22.

(o) *Holy v. Lane*, 2 Atk. 182.

(p) *Bayley*, 256.

in order to entitle himself to the benefit of the law, defeats the wife's right of survivorship. *Richwine v. Keirn*, 1 Penna. Rep. 373; *Glasgow v. Sands*, 3 Gill. & Johns. 96. As to assignment in bankruptcy, see *Poor v. Hazleton*, 15 N. Hamp. 564. An assignment by the husband of the wife's choses in action as collateral security does not deprive her of the right of survivorship if he die before they are reduced to possession. *Hartman v. Dowdel*, 1 Rawle, 279; *Latourette v. Williams*, 1 Barbour, 9. A husband's disclaimer of conversion to his own use, at the time of reducing his wife's chose in action to possession, may be established by his subsequent admissions, but they must be deliberate, positive, precise, clear, and consistent. *Gray's Estate*, 1 Barr, 327; *Timbers v. Katz*, 6 Watts & Serg. 290; *Hind's Estate*, 5 Wharton, 135. A husband, who survives his wife, is entitled to all her choses in action, whether reduced into his possession in his lifetime or not; and in case of his death they go to his personal representatives. *Whitaker v. Whitaker*, 6 Johns. 112; *Revel v. Revel*, 2 Dev. & Bat. 272; *Peyer v. Karwen*, 2 Dessaus. 419; *Lee v. Wheeler*, 4 Georgia, 541.

(1) *Thrasher v. Tuttle*, 9 Shepley, 335.

undergone his punishment is incapable of taking. Therefore, if a bill be indorsed to him, he acquires no title to it.^(q)

A contract in favor of an alien enemy not residing in this country by the king's license, is void at law and in equity. Hence, a bill drawn by an alien enemy on a British subject in England, and indorsed to a British subject abroad, cannot be enforced even after the restoration of peace.^(r)

In general, a corporation can only contract by writing under their common seal.

But to this rule there are exceptions, which the reader will find enumerated in the case of *East London Waterworks Company v. Bayley*, 4 Bing. 283. And among them is the power of issuing bills or notes enjoyed by a company incorporated for the purposes of trade, the very object of whose institution requires that they should exercise this privilege.^(s)(1)

(q) *Bullock v. Dodds*, 2 B. & Ald. 258.

(r) *Willison v. Pattison*, 7 Taunt. 439, E. C. L. R. vol. 2, 1 Moore, 333, S. C.; *Brandon v. Nesbitt*, 6 T. & R. 23.

(s) *Broughton v. Manchester Waterworks Company*, 3 B. & Ald. 1; E. C. L. R. vol. 5.

(1) The old doctrine that a corporation can contract only under its corporate seal is now repudiated. *Chestnut Hill Turnpike Co. v. Rutter*, 4 Serg. & Rawle, 16; *Bank U. S. v. Dandridge*, 12 Wheat. 64; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Fleckner v. Bank U. S.*, 8 Wheat. 338; *Hamilton v. Lyeoming Insurance Co.*, 5 Penna. Stat. Rep. 339.

An insurance company may make a valid promissory note. *Barker v. Mechanic Ins. Co.*, 3 Wend. 94.

A note in the form "I, G. C. L., treasurer" of a corporation, "promise, &c.," is the note of the corporation. *Mann v. Chandler*, 9 Mass. 335. But see *Tucker v. Bass*, 5 Mass. 164.

Power to advance money for a corporation will not authorize signing a note for them. *Webber v. Williams College*, 23 Pick. 302.

A factor employed by the general agent of a corporation to sell the goods manufactured and to purchase stock, has power to buy on credit, but not to give the note of the corporation. *Emerson v. Providence Manufacturing Co.*, 12 Mass. 237.

The general agent of a corporation can give their note for purchases necessary to carry on their business. *Odiorne v. Maxcy*, 13 Mass. 178; *White v. Westport Manufacturing Co.*, 1 Pick. 215; *Butts v. Cuthbertson*, 6 Georgia, 166.

A bill of exchange directed to "John A. Wells, Cashier Farmers and Mechanics Bank of Michigan," and accepted by writing across the face thereof, "Accepted, John A. Wells, Cashier," is drawn upon and accepted by the bank, and not by Wells

But a company incorporated for carrying on public works is not a corporation within the above exception.(*t*)

*A corporation may, like natural persons, sue in assumpsit. The old doctrine that the consideration must not be executory, [**52*] so that promises by it need not be alleged,(*u*) seems to be overruled.(*v*) And a corporation is liable to be sued in that form of action, on negotiable instruments, wherever it has the power to issue them.(*w*)(1)

The capacity of corporations to make, draw, or accept negotiable instruments, is further narrowed by the following enactment, contained in the various statutes passed for protecting the privileges of the Bank of England;(x) "That it shall not be lawful for any body, politic or corporate, whatsoever, or for any other persons whatsoever, united or to be united in covenant or partnership, exceeding the number of six persons, in England, to borrow, owe, or take up any sum or sums of money on their bills or notes payable at demand, or at any less time than six months from the borrowing thereof, during the

(*t*) *Broughton v. Manchester Waterworks Company*, 3 B. & Ald. 1.

(*u*) *Mayor of Stafford v. Till*, 4 Bing. 75, E. C. L. R. vol. 13; 12 Moore, 260, S. C.

(*v*) *Church v. Imperial Gas Company*, 6 Ad. & E. 861, E. C. L. R. vol. 33; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815;* *Paine v. Guardians of the Strand Union*, 15 L. J. 89, M. Ca.

(*w*) *Murray v. East India Company*, 5 B. & Al. 204, E. C. L. R. vol. 7.

(*x*) 39 & 40 Geo. 3, c. 28, s. 15.

in his individual capacity. *Farmers and Mechanics Bank v. Troy City Bank*, 1 Douglas, 457.

A corporation authorized by its charter to employ its stock solely in advancing money upon goods, and the sale of such goods on commission, may lawfully accept bills drawn on account of future consignments. *Munn v. Commission Company*, 15 Johnson, 44.

(1) A cashier has prima facie authority to indorse, on behalf of the bank, securities held by it, and any restriction on this authority must be proved by the party contesting it. *Wild v. Passamaquoddy Bank*, 3 Mason, 505; *Fleckner v. United States Bank*, 8 Wheat. 357; *Everett v. U. States*, 6 Porter, 166; *Elliott v. Abbott*, 12 N. Hamp. 549; *Crocket v. Young*, 1 Smedes and Marsh. 241; *Harper v. Calhoun*, 7 How. Miss. 203; *Farrar v. Gilman*, 19 Maine, 440; *Farmers and Mechanics Bank v. Troy City Bank*, 1 Dougl. 457; *Badger v. Bank of Cumberland*, 26 Maine, 428.

A corporation is liable on a draft drawn or accepted by an authorized agent, though the name of the corporation is not used, if it be drawn or accepted under a name adopted by the corporation. *Conro v. Port Henry Iron Co.*, 12 Barbour, 27.

continuance of the privilege of banking granted to the Governor and Company of the Bank of England.”(y)

It has been held that these restrictions do not affect a *commercial* firm consisting of more than six persons.(z)

But in consequence of the panic in the latter part of the year 1825, the Bank of England consented to forego a portion of their exclusive privilege; and the 7 Geo. 4, c. 46, enacts, accordingly, that corporations or copartnerships of more than six in number, carrying on business more than sixty-five miles from London, may issue bills or notes payable on demand, and that such corporations or copartnerships may issue notes or bills amounting to 50*l.*, payable in London or elsewhere at any period after date or sight.(a)

The third section declares, that any such corporation or partnership may discount bills not drawn by or upon them.

Each offence against the provisions of the act subjects to a penalty of 50*l.*

The act by which the Bank Charter was renewed in 1833, the 3 & 4 Wm. 4, c. 98, continued the privileges bestowed on the Bank of England by the 39 and 40 Geo. 3, and subsequent *acts, [*53] subject to termination on twelve months' notice, to be given after the first August, 1844. The privileges of the Bank are now further continued by the 7 & 8 Vict. c. 32, subject to termination on twelve months' notice, to be given after the first August, 1855.

The 3 & 4 Wm. 4, c. 98, provides that no bank of more than six persons shall issue in London, or within sixty-five miles thereof, bills or notes payable on demand, saving the rights of country bankers to make their notes payable in London.(b)

The 3 & 4 Wm. 4, c. 98, further declares that other corporations and companies of more than six persons may carry on the business of banking in London, provided they do not issue bills or notes at less than six months' date.(c)

(y) For the history and exclusive privileges of the Bank of England more at large, see the case of the Bank of England v. Anderson, 3 Bing. N. Ca. 589, E. C. L. R. vol. 32; 4 Scott, 50; Keen, 328.

(z) Wigan v. Fowler, 1 Stark. 459, E. C. L. R. vol. 2.

(a) The limitation of 50*l.* appears to be abolished by the 3 & 4 Wm. 4, c. 83, s. 2, and 7 & 8 Vict. c. 32, s. 26. As to the mode of recovering penalties, see 8 & 9 Vict. c. 76, s. 5.

(b) 3 & 4 Wm. 4, c. 98, s. 2.

(c) Sec. 3. Therefore a banking partnership of more than six persons, in London, or within sixty-five miles thereof, could not accept a bill at less than six months, drawn upon them by a customer. Bank of England v. Anderson, 3 Bing. N. Ca. 589, E. C. L. R. vol. 32; 4 Scott, 50; Keen, 328, S. C. But the restriction is relaxed by the 7 & 8 Vict. c. 32, s. 26.

That the notes of the branch banks of England shall be made payable where issued.(d)

The Bank of England can issue bank notes unstamped,(e) and has the exclusive privilege of doing so within the city of London and three miles thereof.(f)

No person who was not a banker issuing his own notes on the 6th of May, 1844, can now issue bank notes.(g)

Banks of six, or fewer than six persons, existing as banks of issue before the 6th May, 1844, may issue bills and notes, and promissory notes payable to bearer on demand, on unstamped paper (except within the city of London and three miles thereof) within the provisions of 9 Geo. 4, c. 23, s. 1.

Banking corporations and companies of more than six persons cannot issue in London or within sixty-five miles thereof any bill or note payable on demand.(h)

Every member of a banking partnership is liable to the payment of outstanding notes, though he were not a partner when they were issued.(i)

*The law as to the liability of directors of joint stock companies drawing, accepting, or indorsing bills, involves some [*54] nice distinctions, and is, perhaps, not yet very clearly settled.

It is conceived, however, to be a general rule, that if the directors accept simply in their own names, with or without authority to do so, they, and they only, are liable at law on the bills.(k) And that they are liable at law not only to holders who are strangers, but to holders who may be also holders of letters of allotment, or holders of scrip.(l)

If, however, having authority to bind the company by bills, the directors accept, in the name of the company, a bill drawn on the company, it is conceived that every member of the company is liable

(d) 3 & 4 Wm. 4, c. 98, s. 4.

(e) 7 & 8 Vict. c. 32, s. 7.

(f) 9 Geo. 4, c. 23, s. 1.

(g) 7 & 8 Vict. c. 32, ss. 10, 11, 12.

(h) 39 & 40 Geo. 3, c. 28, s. 15; 3 & 4 Wm. 4, c. 98, s. 3; and see 3 & 4 Wm. 4, c. 83, s. 2. See further *Bank of England v. Anderson*, supra, and *Booth v. Bank of England*, 6 Bing. N. C. 415, E. C. L. R. vol. 37; 1 Scott, N. R. 701, S. C. See also the provisions of 7 Geo. 4, c. 46; 7 & 8 Vict. c. 32, s. 26, and 8 & 9 Vict. c. 76.

(i) 7 Geo. 4, c. 46, s. 1.

(k) Page 26.

(l) *Fox v. Frith*, 10 M. & W. 131.*

as a joint acceptor to any holder, not being also a member of the company.(m)

An authority(n) to make contracts and bargains, and to transact all matters requisite for the affairs of the company, will not in general authorize the directors to draw bills.(o)

Directors signing a *joint and several* note are personally responsible.(p)

If a bill be drawn on several trustees or directors, who have power to bind each other, an acceptance by one in his own name is the acceptance of all.(q)

Notice to one member of a joint stock company is not notice to all.(r)

If persons who fill official situations, as churchwardens, overseers, surveyors, commissioners, managers of joint stock banks, and the like, give bills or notes, on which they describe themselves in their official capacity, they are nevertheless personally liable. Thus, drafts on a banker signed by commissioners under an inclosure act "*as commissioners*," bind the commissioners personally.(s) So does a promissory note given by A. and B. as churchwardens and overseers.(t)

So it is conceived that the legal interest in a bill or note given to an officer in his name of office, vests in the person *who hap-
[*55] pens to fill the office at the time. Thus, a note given to the manager of a joint stock banking company vests at law in the person, who fills that office when the note is given.(u) And where a note was made payable to the trustees acting under A.'s will, parol evidence was held admissible to show who they were and what the trusts were.(v)

But where a note is given to the treasurer of a friendly society for

(m) See *Teague v. Hubbard*, 8 B. & C. 345, E. C. L. R. vol. 15; 2 M. & R. 369, E. C. L. R. vol. 17, S. C.; *Higgins v. Senior*, 8 M. & W. 834; **Fox v. Frith*, 10 M. & W. 131; **Steele v. Harmer*, 15 L. J. Exch. 217; 14 M. & W. 831; *19 L. J. 34, Exch.; 4 Ex. 1,* S. C.

(n) See as to bills by registered companies, 7 & 8 Vict. c. 110, s. 45.

(o) *Harmer v. Steele*, 19 L. J. Exch. 34; 4 Ex. 1,* S. C.

(p) *Healey v. Story*, 18 L. J. 8, Exch. See also *Penkivil v. Connell*, 19 L. J. 305, Exch. (q) *Jenkins v. Morris*, 16 M. & W. 877.*

(r) *Powles v. Page*, 3 C. B. Rep. 31, E. C. L. R. vol. 54; *Steward v. Dunn*, 12 M. & W. 664.* (s) *Eaton v. Petet*, 5 B. & Al. 34, E. C. L. R. vol. 7.

(t) *Rew v. Petet*, 1 Ad. & E. 196, E. C. L. R. vol. 28; 3 Nev. & M. 456, S. C. nom. *Crew v. Retit* and vide ante, p. 26.

(u) *Robertson v. Sheward*, 1 M. & Gran. 511, E. C. L. R. vol. 39; 1 Scott, N. R. 419, S. C.

(v) *Megginson v. Harper*, 4 Tyrwh. 96; 2 Cr. & M. 322,* S. C.

the time being, neither the treasurer when the note is given, nor his successor in office, can maintain an action on the note, for the acts of Parliament, establishing friendly societies, contemplate proceedings by complaint before a justice of the peace.^(w)

*CHAPTER VI.

[*56]

OF THE FORM OF BILLS AND NOTES.

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BILLS and notes are usually, but it is apprehended not necessarily, written on paper. It is conceived that they might be written on parchment, cloth, leather, or any other substitute for paper capable of being transferred from hand to hand.

They may be written in any language, and in any form of words.

A bill or note, or any other contract, may be written in pencil, as well as in ink. "There is," says Abbott, C. J., "no authority for saying, that when the law requires a contract to be in writing, that writing must be in ink. There is not any great danger that our decision will induce individuals to adopt the mode of writing by pencil in preference to that in general use. The imperfection of this mode of writing, its liability to obliteration, and the impossibility of proving it when so obliterated, will prevent its being generally

(w) *Timms v. Williams*, 3 Q. B. Rep. 413, E. C. L. R. vol. 43.

adopted.”(a) Contracts written in pencil have been admitted* at Nisi Prius,(b) and testamentary writing often in the Ecclesiastical Courts.(c)

The signature or indorsement of negotiable instruments may be by a mark.(d)

It is proper, though not necessary, to superscribe the name of the place where the bill or note is made.

But a check on a bank must, unless stamped as a bill, express the place where drawn, and such place must be written within fifteen miles of the banker's place of business.(e)

The 9 Geo. 4, c. 65, prohibits the circulation of all negotiable notes or bills under 5*l.* or on which less than 5*l.* shall remain undischarged, payable to bearer on demand, and which were made, or *purport to be made*, in Scotland, or Ireland, or elsewhere, out of England, under the penalty of 20*l.*, to be recovered in a summary way.

Neither is a date in general essential to the validity of a bill or note; and, if there be no date, it will be considered as dated at the time it was made.(f)(1) And if in pleading it be stated to have been drawn on a particular day, but the declaration does not state the date appearing on the bill, that is sufficient on a motion in arrest of judgment or on demurrer.(g)

(a) *Geary v. Physic*, 5 B. & C. 234, E. C. L. R. vol. 11; 7 Dow. & R. 653, S. C.

(b) *Jeffery v. Walton*, 1 Stark. 267, E. C. L. R. vol. 2.

(c) *Rhymes v. Clarkon*, 1 Phil. 22; *Green v. Shipworth*, 1 Phil. 53; *Dickenson v. Dickenson*, 2 Phil. 173.

(d) *George v. Surrey*, 1 M. & M. 516, E. C. L. R. vol. 22.

(e) 55 Geo. 3, c. 184, s. 13; 9 Geo. 4, c. 49, s. 15. See the Chapter on CHECKS.

(f) *De la Courtier v. Bellamy*, 2 Show. 422; *Hague v. French*, 3 B. & P. 173; *Giles v. Bourn*, 6 M. & Sel. 73; 2 Chit. R. 300, S. C. (g) *Ibid.*

(1) The indorsee, in a suit against the maker, may prove that there was a mistake in the date of the note. *Drake v. Rogers*, 32 Maine, 524.

In an action on a promissory note, which bears date on Sunday, it is competent to allege and prove that it was, in fact, executed and delivered on a different day. *Aldridge v. Branch Bank*, 17 Alabama, 45.

A note is not invalidated by being antedated. *Gray v. Wood*, 2 Har. & Johns. 328; *Richter v. Selin*, 8 Serg. & Rawle, 425. A note takes effect by delivery, and from the time of delivery; but a delivery and at the time of the date will be presumed, until the contrary appear. *Woodford v. Dorwia*, 3 Vermont, 82; *Lansing v. Gaine*, 2 Johns. 300.

The date expressed in the instrument is (except when it is tendered by assignees of a bankrupt as evidence of a petitioning creditor's debt,)(*h*) prima facie evidence of the time when the instrument was made.(*i*)

Promissory notes, payable to bearer on demand, must not have *printed* dates, under the penalty of 50*l.*(*j*)

*In general, a bill or note may be postdated.(*k*) But if [**58*] this is done so as to postpone the time of payment beyond the period of two months after the making, or so as to make it in effect payable at a longer interval than sixty days after sight, and thus evade the higher scale of duty for bills at long dates, a penalty of 100*l.* is incurred,(*l*) and the instrument is inadmissible in evidence.(*m*)

But an unstamped bill or note issued by bankers under the provisions of 9 Geo. 4, c. 23, must not be postdated, under the penalty of 100*l.*(*n*)

All negotiable bills, notes, or drafts, for 20*s.* or any sum between 20*s.* and 5*l.* must bear date before or at the time of issuing, under the penalty of 20*l.*(*o*)

Postdating a check invalidates it, and subjects to a penalty of 100*l.*(*p*)

The usual allegation that a bill or note was made on a particular day is not matter of description, and the day need not be proved as laid.(*q*) It would be otherwise if the declaration went on to *describe* the instrument as bearing date on a particular day.

(*h*) Wright v. Lainson, 2 M. & W. 739; * 6 Dowl. 146, S. C.; see post.

(*i*) Anderson v. Weston, 6 Bing. N. C. 296, E. C. L. R. vol. 37; 8 Scott, 853, S. C.; Taylor v. Kinloch, 1 Stark. 175, E. C. L. R. vol. 2; Obbard v. Betham, 1 M. & M. 486, E. C. L. R. vol. 22; Smith v. Battens, 1 M. & Rob. 341; but see Cowie v. Harris, 1 M. & M. 141, E. C. L. R. vol. 22; 4 M. & P. 722, S. C.; Rose v. Rowcroft, 4 Camp. 245. And this rule applies to written documents in general. Sinclair v. Baggaley, 4 M. & W. 312; * Davies v. Lowndes, 7 Scott's New Rep. 213; Potez v. Glossop, 2 Exch. Rep. 195; * Harrison v. Clifton, 17 L. J. 233, Exch.

(*j*) 55 Geo. 3, c. 184, s. 18.

(*k*) Pasmore v. North, 13 East, 517.

(*l*) 55 Geo. 3, c. 184, s. 12.

(*m*) Field v. Woods, 6 Dow. 23; 7 Ad. & El. 114, E. C. L. R. vol. 34; 2 N. & P. 117, S. C.; Serle v. Norton, 9 M. & W. 309.*

(*n*) S. 12.

(*o*) 17 Geo. 3, c. 30, revived by 7 Geo. 4, c. 6.

(*p*) 55 Geo. 3, c. 184, s. 13; 9 Geo. 4, c. 49, s. 15. See the Chapter on *Checks*.

(*q*) Coxon v. Lyon, 2 Camp. 307, n.; Smith v. Lord, 14 L. J. 112, Q. B.

The sum for which a bill is made is usually superscribed in figures ; in a note or check, the figures are commonly subscribed.

The superscription or subscription of the sum payable is not necessary, if the sum be stated in the body of the note, but it will aid an omission in the body: as, where the word *fifty* was written in the body of the note, without the word *pounds*.(r)

The time of payment is regularly and usually stated in the beginning of the note or bill; but, if no time be expressed, the instrument will be payable on demand.(s)(1)

Negotiable bills or notes under 5*l.* must be made payable within [*59] *the space of twenty-one days from the date.(t) But in other cases there is no limitation as to the time when the bill or note is made payable, but it may be on demand, or at sight, or any certain period after date, or after sight, or at usance. "If a bill of exchange be made payable at never so distant a day, if it be a day that must come, it is no objection to the bill."(u)

The expression, after sight, on a bill of exchange, means after acceptance, or protest for non-acceptance, and not after a mere private exhibition to the drawee, for the sight must appear in a legal way.(v)(2) But if a note is made at or after sight, the expression merely imports that payment is not to be demanded till it has been again exhibited to the maker,(w) for a note being incapable of accep-

(r) Eliot's case, 2 East, P. C. 951; 1 Leach, 175, S. C.

(s) Whitlock v. Underwood, 3 Dowl. & R. 356; 2 B. & C. 157, E. C. L. R. vol. 9; S. C.; Down v. Halling, 4 B. & C. 333, E. C. L. R. vol. 10; 6 Dowl. & R. 455; 2 C. & P. 11, E. C. L. R. vol. 12, S. C.; Bayley, 5th ed. 109. But on a motion to set aside an annuity, the Court will not assume that even a Bank of England note, or a draft on a banker, is payable on demand. See the cases collected in the recent case of Abbott v. Douglas, 1 C. B. Rep. 491, E. C. L. R. vol. 50.

(t) 17 Geo. 3, c. 30.

(u) Willis, C. J., Colehan v. Cooke, Willes, 396.

(v) Marius, 19, cited by Lord Kenyon in Campbell v. French, 6 T. R. 212.

(w) Holmes v. Kerrison, 2 Taunt. 323; Sturdy v. Henderson, 4 B. & Ald. 592, E. C. L. R. vol. 6; Sutton v. Toomer, 7 B. & C. 416, E. C. L. R. vol. 14; 1 M. &

(1) A note payable "twenty-four after date," is not void for uncertainty, nor is it a note payable on demand: it is payable some time after date. It may be averred in the declaration that twenty-four months after date was the time meant by the parties; and the jury will be the judges of the fact of the time of payment intended. Conner v. Routh, 7 Howard (Miss.), 176.

(2) A bill payable so many days after sight, means legal sight, and the bill begins to run from the presentment and acceptance, and not from the time of mere presentment. Mitchell v. De Grand, 1 Mason, 176.

tance, the word "sight" must, on a note, bear a different meaning from the same word on a bill.

Foreign bills are commonly drawn at one, two, or more, usances, or, as it is sometimes expressed, at single, double, treble, or half usance. Usance signifies the usage of the countries between which bills are drawn with respect to the time of payment. If a foreign bill be drawn, payable at sight, or at a certain period after sight, the acceptor will be liable to pay according to the course of exchange at time of acceptance, unless the drawer express that it is payable according to the course of exchange at the time it is drawn, *en especes de ce jour*.(x) Where half usance stands for half a month, it is fifteen days. And, in the case of all bills payable in England, month means calendar month.

The bill or note must be certainly payable at some time or other.(y)

The order to pay need be in no particular form; any expression amounting to an order,(z) or direction, is sufficient.(a) *The [*60] word "*pay*" itself is not indispensable. Any synonymous or equivalent expression will suffice, as "*Credit in Cash.*"(b)

The payee should be particularly described, so that he cannot be confounded with another person of the same name. But if the bill get into the hands of a wrong payee, unless it be payable to bearer, he can neither acquire nor convey a title. One Christian, drew a bill on the defendant, in London, payable to Henry Davis. The bill got Ry. 125, S. C.; Dixon v. Nuttall, 1 C., M. & R. 307; * 6 C. & P. 320, E. C. L. R. vol. 25, S. C. (x) Poth. 174.

(y) Vide post, Irregular Instruments.

(z) Hamilton v. Spottiswood, 18 L. J. 393, Exch.; 4 Ex. 200,* S. C.

(a) Beawes, 3; Marius, 11. In France, *il vous plaira payer*, is the common language of a bill. Morris v. Lee, 2 Ld. Raym. 1397; 1 Stra. 629, S. C. Quære, whether a mere written request, without any words of demand, amount to a bill. Lord Kenyon held this instrument to be a bill:—"Mr. Nelson will much oblige Mr. Webb, by paying to J. Ruff, or order, twenty guineas on his account." Ruff v. Webb, 1 Esp. 129. But Lord Tenterden held the following instrument not to be a bill:—"Mr. Little, *please let the bearer have seven pounds, and place it to my account, and you will oblige your humble servant, R. SLACKFORD.*" Little v. Slackford, 1 M. & M. 171, E. C. L. R. vol. 22. "The paper," says his Lordship, "does not purport to be a demand made by a party having a right to call on the other to pay. The fair meaning is, 'You will oblige me by doing it.'" But see Russell v. Powell, 14 M. & W. 418.*

(b) Ellison v. Collingridge, 19 L. J. 268, C. P.

into the hands of another Henry Davis than the one in whose favor it was drawn, was accepted by the defendant, and by the wrong Henry Davis was indorsed to the plaintiff. Held, that the indorsement of his own name by Henry Davis was, under these circumstances, a forgery, and (dissentiente Lord Kenyon) could convey no title to the plaintiff.(c)(1) If the name be spelt wrong, verbal evidence is admissible to show who was intended.(d) If there be father and son of the same name, it will be intended payable to the father till the contrary appear.(e) But if the son be found in possession of the note, and he indorse, that is evidence that he, and not the father, is payee.(f) A note payable to A., or to B. and C., or his or their order, is not a promissory note, within the statute.(g) A note in this form—"15*l.* 5*s.* balance due to A. C., I am still indebted, and do promise to pay."(h) Or in this—"Received of A. B. 100*l.*, which I promise to pay on demand, with lawful interest," sufficiently designates the payee.(i) A note payable "to the trustees acting under A.'s will," is a good note, and parol evidence is admissible, to show who the trustees are, and what are the trusts.(k)(2) A note was made payable to the manager of the National Provincial Bank of England. To an action by the payee in his own name, the defendant pleaded that he did not make the note. Held, that under this plea, the plaintiff was entitled to recover.(l)

[*61] *If the bill be not made payable, either to any payee in particular, or to the drawer's order, or to bearer in general,

(c) Mead v. Young, 4 T. R. 28.

(d) Willis v. Barret, 2 Stark. 29, E. C. L. R. vol. 3.

(e) Sweeting v. Fowler, 1 Stark. 106, E. C. L. R. vol. 2; Wilson v. Stubs, Hobart, 330; see Bro. Ab. Addition, 18, 34, 43, 9 to 6; 13 Dyer, 5.

(f) Stebbing v. Spicer, 19 L. J. 24, C. P.

(g) Blanckenhagen, v. Blundell, 2 B. & Al. 417.

(h) Chadwick v. Allen, 1 Stra. 706.

(i) Green v. Davies, 4 B. & C. 235, E. C. L. R. vol. 10; 6 D. & R. 306, S. C.

(k) Megginson v. Harper, Tyr. 96; 2 Cr. & M. 322,* S. C.

(l) Robertson v. Sheward, 1 Man. & Gran. 511, E. C. L. R. vol. 39; 1 Scott, N. R. 419, S. C.

(1) Every negotiable note must be negotiated by the person (or his representatives) to whom the note was made payable and not by a person of the same name. Foster v. Shattuck, 2 New Hamp. 446. It is competent for the holder of a promissory note or other instrument to declare upon it as a promise made to himself in a name different from his own, and to prove that he was the person intended. Patterson v. Graves, 5 Blackford, 593; Jester v. Hopper, 8 English, 43.

(2) A note payable to the administrator of A.'s estate is a good promissory note. Moody v. Threlkeld, 13 Georgia, 55.

it would seem, according to the opinion of the majority of the Judges,^(l) to be payable to bearer; but, according to the opinion of Eyre, C. B., in the same case, it is mere waste paper.^(m)⁽¹⁾ If drawn payable to a fictitious payee, and the drawer indorse the fictitious payee's name, the holder cannot, either as indorsee or bearer, recover against the acceptor;⁽ⁿ⁾ but if the holder's money has got into the acceptor's hands, the holder may recover it as money had and received. If the acceptor, at the time of acceptance, *knew* the payee to be a fictitious person, he shall not take advantage of his own fraud; but a bona fide holder may recover against him on the bill, and declare on it as payable to bearer, or may recover on the money counts.^(o)

(l) *Minet v. Gibson*, 1 H. Bl. 608.

(m) In *Rex v. Randall*, Russ. C. C. 185, a bill payable to —, or order, was held not to be a bill of exchange, because there was no payee; and see *Rex v. Richards*, 1 R. & R. C. C. 193.

(n) *Bennett v. Farnell*, 1 Camp. 130.

(o) *Minet v. Gibson*, 3 T. R. 481; judgment affirmed in Parliament, 1 H. B. 569; and see *Vere v. Lewis*, 3 T. R. 182; *Collis v. Emett*, 1 H. Bl. 313; *Tatlock v. Harris*, 3 T. R. 174. To *Bennett v. Farnell*, 1 Camp. 130, the learned reporter appends the following note:—"Almost all the modern cases upon this question arose out of the bankruptcy of Livesay and Co., and Gibson and Co., who negotiated bills, with fictitious names upon them, to the amount of nearly a *million sterling a year*. The first case was *Tatlock v. Harris*, 3 T. R. 174, in which the Court of K. B. held, that the bona fide holder for a valuable consideration of a bill drawn payable to a fictitious person, and indorsed in that name by the drawer, might recover the amount of it in an action against the acceptor, for money paid or money had and received, upon the idea, there was an appropriation of so much money to be paid to the person who should become the holder of the bill. In *Vere v. Lewis*, 3 T. R. 182, decided the same day, the Court held, there was no occasion to prove that the defendant had received any value for the bill, as the mere circumstance of his acceptance was sufficient evidence of this; and three of the Judges *thought* the plaintiff might recover on a count which stated that the bill was drawn payable to *bearer*. *Minet v. Gibson*, 3 T. R. 481, put this point directly in issue, and the unanimous opinion of the Court was, that where the circumstance of the payee being a fictitious person is known to the acceptor, the bill is in effect payable to bearer. Soon after the Court of C. P. laid down the same doctrine in *Collis v. Emett*, 1 H. Bl. 313. This decision was acquiesced in; but *Minet v. Gibson* was carried up to the House of Lords, 1 H. Bl. 569. The opinion of the Judges being then taken, Eyre, C. B. (p. 618), and Heath, J. (p. 619), were for reversing the judgment of the Court below, and Lord Thurlow, C., coincided

(1) An instrument for the payment of money not payable to any particular person or to bearer, is not negotiable; and a memorandum made by a payee on the back of a note in these words, "Mr. A., pay on within \$750," did not authorize a recovery on the money counts by the holder against the payee. *Douglass v. Wilkeson*, 6 Wendell, 637.

[*62] If a blank be left for the payee's *name, a bona fide holder may fill it up with his own name, and recover against the drawer.(p) But, in order thus to charge the acceptor, the holder must show that he had authority from the drawer to insert his own name as payee.(q)

If the name of the payee do not purport to be the name of any *person*, as where a note was made payable to Ship Fortune or bearer, it is a note payable to bearer simply.(r)

By the 17 Geo. 3, c. 30, all negotiable instruments under 5*l.* must specify the name and *place of abode* of the payee.

Unless a bill or note be payable to *order* or to *bearer*, it is not negotiable, though still a valid security as between the original parties;(s) but, if it be, notwithstanding, assigned by the payee, he is chargeable at the suit of an indorsee.(t)(1)

A bill or note may be made payable to A. B. or order, or to A. B. or bearer,(u) or to the drawer's own order,(v) or to bearer generally.

If made payable to order, it is assignable by indorsement; if made payable to bearer, it is assignable by mere delivery.

with them (p. 625), but the other Judges thinking otherwise, judgment was affirmed. Parl. Cas. 8vo. ii. 48. The last case upon the subject reported, is Gibson v. Hunter, 2 H. Bl. 187, 288, which came before the House of Peers upon a demurrer to evidence, and in which it was held, that in an action on a bill of this sort against the acceptor, to show that he was aware of the payee being fictitious, evidence is admissible of the circumstances under which he had accepted other bills payable to fictitious persons. Vide Tuft's case, Leach, Cro. Law. 159."

(p) Crutchley v. Clarence, 2 M. & Sel. 90; Attwood v. Griffin, R. & M. 425; 2 C. & P. 368, E. C. L. R. vol. 12; S. C.

(q) Crutchley v. Mann, 5 Taunt. 529, E. C. L. R. vol. 1; 1 Marsh. 29, E. C. L. R. vol. 4; S. C.

(r) Grant v. Vaughan, 3 Burr. 1516.

(s) Smith v. Kendall, 6 T. R. 123; 1 Esp. R. 231, S. C; Rex v. Box, 6 Taunt. 325, E. C. L. R. vol. 1; Russ. & Ry. 300, S. C. See post, Chapter on *Transfer*.

(t) Hill v. Lewis, 1 Salk. 133. See further on this subject the Chapter on *Transfer*.

(u) As to bills payable to bearer on demand, see the last Chapter.

(v) Drawn payable to the drawer's order, it is payable to himself. Smith v. McClure, 5 East, 476; 2 Smith, 443, S. C.

(1) The words "or order," or words tantamount, are necessary to make a note negotiable. Fernon v. Farmer, 1 Harring. 32; Hackney v. Jones, 3 Humph. 612; Reed v. Murphy, 1 Kelley, 236.

A bill or note made payable "to the order" of the plaintiff, need not be indorsed by him before suit brought. It is the same as if made payable to the plaintiff or order. Huling v. Hugg, 1 Watts & Serg. 418.

The sum for which a bill is made payable is usually written in the body of the bill in words at length, the better to prevent alteration; and, if there be any difference between the sum in the body and the sum superscribed, the sum mentioned in the body will be taken to be that for which the bill is made payable;(*w*) when the figures express a larger sum than the words, evidence to show that the difference arose from an accidental omission of words, is inadmissible.(*x*) We have already seen, that an omission in the body will be aided by the superscription.(*y*)

An inaccurate, but intelligible, statement of the sum payable will not vitiate. Thus, an order, or promise to pay so many **“pound,”* instead of *“pounds,”* is a good bill or note.(*z*) [**63*] A bill for *“twenty-five, seventeen shillings and three,”* is a bill for 25*l.* 17*s.* 3*d.*(*a*)(1) The word *sterling* means sterling in that part of the kingdom where the bill is payable.(*b*)

All negotiable bills, notes, or drafts, for any sum under 20*s.*, are avoided by 48 Geo. 3, c. 88, s. 22; and the third section imposes on the utterers and negotiators of such notes, bills, or drafts, a penalty of 5*l.* to 20*l.* at the discretion of a magistrate, to be recovered in a summary way.

Bills or notes for more than 20*s.* and less than 5*l.* (except checks on bankers), are also void, unless they specify the name and abode of the payee, are attested by a subscribing witness, bear date at or before the time of issue, and are made payable within twenty-one days after date, but not to bearer on demand. And such an instrument cannot be negotiated after the time limited for its payment.(*c*)

Until the recent act of 3 & 4 Wm. 4, c. 83, s. 2, no bills or notes for any sum under 50*l.* could be issued or made payable to any

(*w*) Marius, 138; Beawes, 193; Saunderson v. Piper, 5 Bing. N. C. 425, E. C. L. R. vol. 35; 7 Scott, 408, S. C.

(*x*) Saunderson v. Piper, 5 Bing. N. C. 425, E. C. L. R. vol. 35; 7 Scott, 408, S. C.

(*y*) Elliot's case, 2 East, P. C. 951; 1 Leach, 175, S. C.

(*z*) Rex v. Port, Bayley, 12, 6th ed. •

(*a*) Phipps v. Tanner, 5 C. & P. 488, E. C. L. R. vol. 24.

(*b*) Taylor v. Booth, 1 C. & P. 286, E. C. L. R. vol. 12.

(*c*) 17 Geo. 3, c. 30; 7 Geo. 4, c. 6.

(1) Booth v. Wallace, 2 Root, 247.

corporation or copartnership consisting of more than six members, within sixty-five miles of London.(d)

There are some old cases tending to show that the words *value received* are an essential part of a bill;(e) but it is now well settled that they are not at all material.(f)(1)

It has been indeed laid down,(g) that "to entitle the holder of an inland bill or note for the payment of 20*l.*, or upwards, to recover interest and damages against the drawer and indorser, in default of acceptance or payment, it shall contain the words 'value received.'"(h) But it is conceived that this opinion is unfounded. It seems to rest on the assumption that a protest is necessary for this purpose, and that the statutes of Wm. 3 and Anne do not authorize or direct a protest, except the bill be expressed to be made for value received. But it has been decided that the 8th section of 3 & 4 Anne, c. 9, makes a protest unnecessary for this purpose;(i) and, even if it were [*64] necessary *under those statutes, in bills where those words are expressed, it would not be necessary where they are not; for, upon a careful perusal of both statutes, it will appear that they only apply to bills expressed to be for value received; and the 6th section of the 3 & 4 Anne distinctly declares, that a protest shall not be necessary, unless the words "value received" appear on the face of the bill; thus, leaving bills where these words are not as at common law: and at common law no inland bill need be protested, in order to charge the drawer with interest and damages.(k) For this purpose,

(d) 7 Geo. 4, c. 46, s. 2. See now the 7 & 8 Vict. c. 32, and 8 & 9 Vict. c. 76.

(e) *Cramlington v. Evans*, 1 Show. 5; *Vin. Bills of Exch.* G. 2.

(f) *White v. Ledwich*, Bayley, 40, 6th ed.; 4 Doug. 427, E. C. L. R. vol. 26, S. C.; *Grant v. Da Costa*, 3 M. & Sel. 351; and see *Poplewell v. Wilson*, 1 Stra. 264, and *infra*, note (l).

(g) *Chitty*, p. 67.

(h) 9 & 10 Wm. 3, c. 17; 3 & 4 Anne, c. 9, s. 4.

(i) *Windle v. Andrews*, 2 B. & Ald. 696; 2 Stark. 425, E. C. L. R. vol. 3, S. C.

(k) *Per Bayley, J.*, 2 B. & Ald. 701.

(1) The words "value received" are not necessary in a bill of exchange or other negotiable instrument. *Benjamin v. Fillman*, 2 McLean, 213; *Townsend v. Derby*, 3 Metcalf, 363; *Hubble v. Fogartie*, 3 Rich. 413.

A paper directed to certain persons requesting them to pay a specified sum to a person named, and charge the same to the account of the drawer, and dated and signed, is a bill of exchange, although it is neither made payable to order or bearer, nor has the words "value received," nor is made payable at a day certain, nor at a particular place. *Kendall v. Galvin*, 15 Maine, 131.

therefore (if the statutes made any difference), a bill would be more readily effectual without these words than with them.

It has been questioned whether an action of *debt* will lie on a bill, unless the consideration be expressed,^(l) but it is now decided that debt will lie although the consideration be not expressed.^(m)

The words "*value received*," are ambiguous, where the bill is drawn payable to a third person; for they may mean either value received, by the drawer of the payee, or by the acceptor of the drawer. But the first is the more probable interpretation; for it is more natural "that the party who draws the bill should inform the drawee of a fact which he does not know, than of one of which he must be well aware."⁽ⁿ⁾

If, however, the bill is drawn payable to the drawer's own order, the words "*value received*" must mean received by the acceptor of the drawer; and on such a bill, if the declaration state that it was for value received by the drawer, it will be a variance.^(o) "*Value received*," in a note, means received by the maker of the payee.^(p)

Though the nature or particulars of the consideration appear on the bill or note, it is not necessary to state it in the declaration, or it may be stated generally as value received.^(q) "The defendant," says Maule, J., "may prove that the note was given for a different consideration, or without any consideration at all."^(r)

*But it has been held that the defendant will not be allowed to contradict his written admission on the note, of the nature [*65] of the consideration. Where a note was given by the administratrix, and expressed to be "for value received by my late husband," she

(l) Bishop v. Young, 2 B. & P. 78; Priddy v. Henbry, 3 D. & R. 165; 1 B. & C. 674, E. C. L. R. vol. 8, S. C.

(m) Hatch v. Trays; Watson v. Kightly, 15 Ad. & E. 702; 3 Per. & Dav. 408, S. C.

(n) Per Lord Ellenborough, in Grant v. Da Costa, 3 M. & Sel. 351.

(o) Highmore v. Primrose, 5 M. & Sel. 65.

(p) Clayton v. Gosling, 5 B. & C. 361, E. C. L. R. vol. 11; 8 Dowl. & R. 110.

(q) Coombs v. Ingram, 4 D. & R. 211; E. C. L. R. vol. 16; Bond v. Stockdale, 7 D. & R. 110, E. C. L. R. vol. 16.

(r) Abbott v. Hendrich, 1 M. & G. 796, E. C. L. R. vol. 39; 2 Scott, N. R. 183, S. C. Where the note on the face of it purported to be given for "value received in Pennance shares pursuant to annexed contract," it was held unnecessary to put in any contract. Fox v. Frith, Car. & Mar. 502.

was not allowed to show that the note was given only as an indemnity, and that the payee had not been damnified.(s)(1)

The signature of the drawer or maker of a bill or note is usually subscribed in the right-hand corner; but it is sufficient if written in any other part. Thus, "I, J. S., promise to pay," has been held a sufficient signature of a promissory note.(t) A man who cannot write may sign a bill by his mark.(u)

An allegation in pleading that a party *made* his bill or note is sufficient without alleging that he *signed* it, for *making* implies *signing*.(v)

If a deed be first executed, and then written or filled up, the deed is void;(w) but it is otherwise with a bill of exchange. For, if a stamped paper be signed, leaving blanks for the date, sum, time when payable, and name of the drawee, the drawer will be chargeable for any sum afterwards inserted within the amount warranted by the stamp. It is a letter of credit for an indefinite but not unlimited sum.(x)(2)

(s) *Ridout v. Bristow*, 1 Crompt. & J. 231; 1 Tyr. 84, S. C.; and see *Edwards v. Jones*, 2 M. & W. 414; * 5 Dowl. 585; 7 C. & P. 633, E. C. L. R. vol. 32, S. C.

(t) *Taylor v. Dobbins*, 1 Stra. 399; *Saunderson v. Jackson*, 2 Bos. & Pul. 238.

(u) *George v. Surrey*, 1 M. & M. 516, E. C. L. R. vol. 22.

(v) *Elliott v. Cowper*, 1 Stra. 609; 2 Lord Raym. 1376, S. C.; 8 Mod. 307; *Ereskine v. Murray*, 2 Lord Raym. 1542; 1 Barn. 88, S. C.

(w) Com. Dig. Fait, (A.) 1.

(x) *Collis v. Emett*, 1 H. Bl. 313; *Russell v. Langstaffe*, 2 Doug. 496; *Snaith v. Mingay*, 1 M. & S. 87, E. C. L. R. vol. 28; *Leslie v. Hastings*, 1 M. & R. 119; *Molloy v. Delves*, 7 Bing. 428, E. C. L. R. vol. 20; 5 M. & P. 275; 4 C. & P. 492, E. C. L. R. vol. 19, S. C.

(1) Between the original parties the consideration of a bill or note can always be inquired into; and it would practically abolish this rule, and lead to great oppression and injustice if the maker or drawer were held to be estopped by any mere statement on the face of the paper as to the character of the consideration. *Ryberg v. Snell*, 2 Wash. C. C. Rep. 294; *Lawrence v. The Stonington Bank*, 6 Conn. 464; *Parish v. Stone*, 14 Pick. 198; *Slade v. Halsted*, 7 Cowen, 322; *Pearson v. Pearson*, 7 Johns. 26; *Barnet v. Offerman*, 7 Watts, 130.

(2) Where a note is signed and delivered with a blank left for the sum payable, though the first holder is restricted as to the amount to be inserted, yet, if the note comes into the hands of another, who, without notice of the restriction, fills the blank with a larger sum, the obligor will be bound by it. *Bank of Commonwealth v. Curry*, 2 Dana, 142.

A person signing his name on a blank paper and delivering it to another authorizes him to fill up the blank with any sum. *Bank of Limestone v. Penick*, 5 Monroe, 25.

By the 17 Geo. 3, c. 30, in every negotiable bill, note, or draft, under 5*l.*, the signature of the drawer or maker must be attested by one subscribing witness at the least. And though, in all other cases, a subscribing witness is unnecessary, yet if there be one, he must be called; but if he cannot prove it, other evidence is then admissible.^(y) So, if he purposely keep out of the way, or diligent search have been made for him without effect.^(z)

If a question arises whether a party signing a note *be the same person who has done some other act, as for example, [^{*66}] made a payment on account of the note, the attesting witness must be called.^(a)

A bill of exchange, being, in its original, a letter, should be properly addressed to the drawee. But where a bill was made payable "at No. 1, Wilmot Street, opposite the Lamb, Bethnal Green, London," without mentioning the drawee's name, and the defendant accepted it, he was not allowed to make the objection.^(b) But a bill cannot be addressed to one man and accepted by another.^(c) A bill directed to A., or in his absence to B., being accepted by A., may be declared on without taking notice of B.^(d) If the word *at* precede the drawee's name, whether inserted ignorantly or fraudulently, the instrument is still a bill of exchange.^(e) A bill may be directed to the drawer himself, though it is, in that case, rather a note than a bill.^(f) (1)

(y) *Lemon v. Deane*, 2 Camp. 636, n.

(z) *Burt v. Walker*, 4 B. & Ald. 697, E. C. L. R. vol. 6.

(a) *Wilde v. Porter*, 3 N. & M. 585, E. C. L. R. vol. 28.

(b) *Gray v. Milner*, 8 Taunt. 639, E. C. L. R. vol. 4; 3 Moore, 90, S. C.

(c) *Davis v. Clark*, 13 L. J. 305, Q. B.; 6 Q. B. 16, E. C. L. R. vol. 51, S. C.

(d) *Anon.* 12 Mod. 447.

(e) *Shuttleworth v. Stephens*, 1 Camp. 407; *Rex v. Hunter*, R. & R. C. C. 511; *Allan v. Mawson*, 4 Camp. 115.

(f) *Block v. Bell*, 1 Mood. & Rob. 149; *Starke v. Cheesman*, Carth. 509; *Dehors v. Harriott*, 1 Show. 163; *Robinson v. Bland*, 2 Burr. 1077; *Jocelyn v. Lasserre*, Fort. 282; see *Davis v. Clarke*, 6 Q. B. Rep. 16, E. C. L. R. vol. 51.

(1) It is not necessary to constitute a bill of exchange that there should be three distinct parties to it. A bill drawn by a party upon himself is a bill of exchange in the hands of an indorsee. *Randolph v. Parish*, 9 Porter, 76.

A general request in writing to pay money to the drawer's own order, is a bill of exchange, which the drawer may make payable to himself by indorsement and notice to the acceptor before it is due. *Rice v. Hogan*, 8 Dana, 133.

It is not necessary that the various parties to a negotiable instrument should be different persons, in order to render it a bill of exchange. *Wildes v. Savage*, 1 Story, 22.

If the drawer intends that the bill should be payable at a particular place, he may insert such a direction. Without the words, "only and not elsewhere," appended to such direction, the acceptance will be general, within 1 & 2 Geo. 4, c. 78, (g) so as to charge the *acceptor*. The drawer himself cannot be charged, unless the bill have been presented at the place where the drawer himself made it payable. (h) This statute does not apply to promissory notes; and, therefore, if any place of payment be mentioned in the body of a note, it is part of the contract. The place of payment must be described in the declaration, and a presentment there is essential, in order to charge the maker or any other party. (i) But, where the place of payment is merely stated in a memorandum at the foot or in the margin of [*67] the note, by way of direction, it need not *be noticed in pleading, and presentment there is not essential. (k)

But where the whole note was printed (except the names, dates, and sum), and a place of payment was also printed at the bottom of the note, Lord Ellenborough held that a special presentment at this particular place was necessary. (l) If the drawer of a bill makes it payable at his own house, that circumstance is evidence of its being an accommodation bill. (m)

The 7 Geo. 4, c. 6, s. 10, enacts that every promissory note under 20*l.* payable to bearer on demand, must be made payable at the place where issued, but may be made payable at other places also.

Bills or notes drawn by copartnerships or corporations of more

(g) *Selby v. Eden*, 3 Bing. 611, E. C. L. R. vol. 11; 11 Moore, 511, S. C.; *Fayle v. Bird*, 6 B. & C. 531, E. C. L. R. vol. 13; 9 Dowl. & R. 639, E. C. L. R. vol. 22.

(h) *Gibb v. Mather*, in error, 8 Bing. 214, E. C. L. R. vol. 21; 1 M. & Scott, 387, S. C.; 2 C. & J. 254,* S. C.; *Hodge v. Fillis*, 3 Camp. 463.

(i) *Sanderson v. Bowes*, 14 East, 500; *Roche v. Campbell*, 3 Camp. 247.

(k) *Price v. Mitchel*, 4 Camp. 200; *Exon v. Russell*, 4 M. & Sel. 506; *Williams v. Waring*, 10 B. & C. 2, E. C. L. R. vol. 21; 5 M. & Ry. 9, S. C. But in *Hardy v. Woodruffe*, 2 Stark. 319, and in *Sproule v. Legg*, 3 Stark. 156, E. C. L. R. vol. 3, Lord Tenterden held that the note might be described as made payable at a place mentioned in the memorandum only.

(l) *Trecothick v. Edwin*, 1 Stark. 468, E. C. L. R. vol. 2.

(m) *Sharp v. Bailey*, 9 B. & C. 44, E. C. L. R. vol. 17; 4 Man. & Ry. 4, S. C.

An order drawn by the president of a corporation on the treasurer, payable on demand, may be declared on when dishonored as a bill of exchange. *Wetumpka & Coosa Railroad v. Bingham*, 5 Alabama, 657; *Hasey v. White Pigeon Beet Sugar Co.*, 1 Doug. 193. Such a bill is the same, in legal effect, as a promissory note; it imports a promise to pay on demand, and an action may be maintained upon it without proof of a demand of payment from the treasurer of the corporation. *Ibid*.

than six persons, must, by 7 Geo. 4, c. 46, specify the place of payment, and that place must not be in London, or within sixty-five miles thereof, unless in case of a bill for 50*l.* and upwards, drawn payable at some period after date or sight.⁽ⁿ⁾ But this restriction, as to making the bills payable in London, is now removed by 3 & 4 Wm. 4, c. 83, s. 2. And the restriction is further relaxed by 7 & 8 Vict. c. 32, s. 26.

Notes of the branches of the Bank of England are payable at the Bank in London; but none of their notes are payable at a branch bank, unless specially made payable at such branch.^(o)

The direction to place to account is unnecessary.^(p)

A bill is sometimes directed to be paid "*as per advice*;" sometimes "*without further advice*;" sometimes "*with or without further advice*;" and sometimes, and more commonly, without any of these words. In the first case, it is said the drawee is not justified in paying without further advice.^(q)

*CHAPTER VII.

[*68]

OF AMBIGUOUS, CONDITIONAL,^(a) AND IRREGULAR INSTRUMENTS.

NOTE PAYABLE TO THE MAKER,	68	PERIOD OF PAYMENT MAY BE UNCER-	
EQUIVOCAL INSTRUMENTS,	68	TAIN IF INEVITABLE,	72
BILLS AND NOTES MUST BE FOR PAY-		WHERE SEVERAL MAKERS OR SEVERAL	
MENT OF A SUM OF MONEY, AND FOR		PAYEES ARE RESPECTIVELY LIABLE	
THAT ONLY,	70	OR ENTITLED IN THE ALTERNATIVE,	73
AND FOR MONEY IN SPECIE,	70	MUST NOT BE MADE PAYABLE OUT OF	
AND FOR A SUM CERTAIN,	70	A PARTICULAR FUND,	73
AND FOR PAYMENT OF IT,	71	IRREGULAR BILL OR NOTE MAY BE AN	
MUST NOT SUSPEND PAYMENT ON A		AGREEMENT,	74
CONDITION,	71		

A NOTE cannot of course be made by a man to himself, without more. Neither can it be made to himself and another man.^(b)

(n) 7 Geo. 4, c. 46, s. 1.

(o) 3 & 4 Wm. 4, c. 98, s. 6, which they must now be; see p. 53.

(p) Laing v. Barclay, 1 B. & C. 398, E. C. L. R. vol. 8; 2 D. & R. 530, S. C.

(q) Chitty, 162, 9th ed.

(a) As to the contracting words in promissory notes, see Chapter ii.

(b) See Moffatt v. Van Milligen, 2 Bos. and Pul. 14, n.; Mainwaring v. Newman, Ibid. 120; and see Teague v. Hubbard, 8 B. & C. 345. Quære, whether a note

But a note made payable to the maker's order becomes, in legal effect, when indorsed in blank, a note payable to bearer ;(c) and when specially indorsed, a note payable to the indorsee's order.(d)

If an instrument be made in terms so ambiguous that it is doubtful whether it be a bill of exchange or promissory note, the holder may treat it as either, at his election.(1) Thus where *for goods [*69] sold and delivered, the defendant gave the plaintiff an instrument in the following form :

£44 11s. 5d.

London, 5th August, 1833.

Three months after date, I promise to pay Mr. John Bury, or promising to pay to the maker's order, or to the maker or order, be a note within the statute. Such a note was sued on in *Richards v. Macey*, 14 M. & W. 484.* It should rather seem, when indorsed by the maker in blank, to be in legal effect a note payable to bearer. So decided by the Court of C. P. since these observations were written. *Browne v. De Winton*, 17 L. J. 281, C. P.; 6 C. B. 336, E. C. L. R. vol. 60, S. C.; see ante, Chapter iv.

(c) *Brown v. De Winton*, 17 L. J. 280, C. P.; 6 C. B. 336, E. C. L. R. vol. 60, S. C.

(d) *Gay v. Lander*, 17 L. J. 287, C. P.; 6 C. B. 336, E. C. L. R. vol. 60, S. C.

(1) An indorsement on a bond, ordering the contents to be paid to order for value received is a good bill of exchange. *Bay v. Freazer*, 1 Bay, 66. So of a request to pay a promissory note, written under the note by the promisor; and the drawee, after acceptance, is liable to an action. *Leonard v. Mason*, 1 Wend. 522. As between indorsee and indorser, a promissory note is a bill of exchange as to demand and notice. *Crenshaw v. McKiernan*, Minor, 295. Where a promissory note made by a resident of one state, and payable to a person resident in another, is indorsed, if the indorsement can be regarded as a bill, it is to be deemed a foreign bill. *Carter v. Burley*, 9 N. Hamp. 558.

A writing, purporting to be a certificate that A. had deposited a sum of money in a bank of the City of New York, dated July 6th, 1839, and payable on the 1st Dec. then next, to the order of A., and signed by the president of the bank, was assigned to B. for value received by an indorsement thereon, subscribed by A. Held that such indorsement was a bill of exchange, imposing on the parties the ordinary liabilities attached to that kind of paper. *Kilgore v. Bulkley*, 14 Conn. 362.

Although a note be not in form negotiable, the payee may make it so by indorsing it payable to order, after which it becomes, as between him and the holder, an inland bill of exchange, which an indorsee takes subject to the same rules which govern instruments negotiable in their inception. *Brenizer v. Wightman*, 7 Watts & Serg. 264. See *Leidy v. Tammany*, 9 Watts, 353; *Elkinton v. Fennimore*, 13 Penna. State Rep. 173.

order, forty-four pounds, eleven shillings, and five pence, value received.

J. B. GRUTHEROT,
35, *Montague Place*,
Bedford Place.

JOHN BURY.

And Grutherot's name was written across the instrument as an acceptance, and Bury's name on the back as an indorsement, it was held that the plaintiff might treat the defendant Bury either as a drawer of a bill or maker of a note, and therefore was not bound to give him notice of dishonor.^(e)

So where an instrument was in the following form :

21st October, 1804.

Two months after date, pay to the order of John Jenkins, £78 11s., value received.

THOMAS STEPHENS.

At Messrs. JOHN MORSON & Co.

Lord Ellenborough held that it was properly a bill of exchange, but that perhaps it might have been treated as a promissory note, at the option of the holder.^(f)(1)

(e) *Edis v. Bury*, 6 B. & C. 433, E. C. L. R. vol. 60; 39 Dowl. & R. 392; see *Edwards v. Dick*, 4 B. & Ald. 212, E. C. L. R. vol. 6; *Block v. Bell*, 1 M. & Rob. 149; see *Dickenson v. Teague*, 4 Tyrwh. 450; 1 C. M. & R. 241,* S. C.

(f) *Shuttleworth v. Stephens*, 1 Camp. 407; *Allan v. Mawson*, 4 Camp. 115; *Gray v. Milner*, 8 Taunt. 739, E. C. L. R. vol. 4; 3 J. B. Moore, 90, S. C.; *Rex v. Hunter*, R. & R. C. C. 511.

(1) A note promising to pay A. a given sum in one from the first of October following the date, in cattle or in grain the first of January following, held void for uncertainty. *Wainwright v. Straw*, 15 Verm. 215. A note payable "twenty-four after date" is not void for uncertainty, nor is it a note on demand; it is payable some time after date. Such a note is admissible in evidence without other testimony, under an averment in the declaration that twenty-four months after date was the time meant by the parties; the jury being the judges of the fact of the time of payment intended. *Conner v. Routh*, 7 How. Miss. 176. See *Henschel v. Mahler*, 3 Denio, 428; *Sweetser v. French*, 13 Metcalf, 262; *White v. Word*, 22 Alabama, 442; *Burnham v. Atters*, 1 Gray, 496. In ascertaining the amount of a note, where there is an uncertainty, it was held that the words in the body, not the figures in the margin, should govern. *Mears v. Graham*, 8 Blackf. 144; *Smith v. Smith*, 1 Rhode Island, 398.

In an action on a note for "the sum of fifty-two 25-100," it was held that the fraction showed beyond question that the word omitted was "dollars." *Murrill v. Handy*, 17 Missouri, 406.

A man may draw a bill on himself, *(g)* and of that opinion were all the Judges of the C. P. *(h)* Perhaps such a bill would be good where the drawer draws on himself *payable to his own order*; *(i)* and a bill is sometimes drawn payable to the drawee's order. It is conceived, that in the latter case, as well as the former, the instrument might, when accepted, be declared on as a promissory note of the drawee. But a bill, payable to the drawee's order, is clearly not a bill of exchange. *(k)*

[*70] *If a man draw a bill upon himself, it may be treated by the holder as a note. *(l)* So may a bill drawn by a banking company in one place, on the same banking company in another place. *(m)*

An instrument which directs the drawee to pay *without acceptance*, is nevertheless a bill of exchange. *(n)*

A note written by the creditor to his debtor at the foot of the creditor's account, requesting the debtor to pay that account to the creditor's agent, has been held not a bill of exchange, nor an order for the payment of money within the Stamp Act. *(o)*

Bills and notes must be for the payment of money only, and not for the payment of money and the performance of some other act. *(1)* Therefore, *(p)* a note to deliver up horses and a wharf, and pay money at a particular day, was held no promissory note. Nor must a bill or note

(g) *Starke v. Cheesman*, Carthe, 508; *Dehers v. Harriot*, 1 Show. 163; *Robinson v. Bland*, 2 Burr. 1077.

(h) *Magor v. Hammond*, C. P., cited by Bayley, C. J., 9 B. & C. 364, E. C. L. R. vol. 17; and see *Roach v. Ostler*, 1 Man. & R. 120, E. C. L. R. vol. 17.

(i) 1 Pardessus, 351.

(k) *Reg. v. Bartlett*, 2 Mood. & Rob. 362.

(l) *Roach v. Ostler*, 1 M. & R. 120, E. C. L. R. vol. 17.

(m) *Miller v. Thomson*, 11 L. J., C. P. 21; 3 M. & G. 576, E. C. L. R. vol. 42.

(n) *Reg. v. Kinnear*, 2 Moo. & Rob. 117; *Miller v. Thomson*, 3 M. & G. 576; E. C. L. R. vol. 42.

(o) *Norris v. Solomon*, 2 Mood. & Rob. 266.

(p) *Martin v. Chauntry*, 2 Stra. 1271; *Moor v. Vanlute*, B. N. P. 272, 5th ed.; *Follett v. Moore*, 19 L. J. 6, Exch.; 4 Exch. 410,* S. C. In this case a note agreeing also to give real security, was held void as a note. But a note reciting that real security *had been given*, is a good note, and requires only a note stamp. *Fancourt v. Thorne*, 9 Q. B. Rep. 312, E. C. L. R. vol. 58. See ante, chapter iv. An instrument in this form, "I promise to pay C. A. D. or bearer on demand the sum of 16*l.* at sight, by giving up clothes and papers, &c.," was held a good promissory note, it being considered, that the latter words imported the consideration already received by the maker. *Dixon v. Nuttall*, 1 C. M. & R. 307,* 6 C. & P. 320, E. C. L. R. vol. 25, S. C.

(1) *Austin v. Barns*, 16 Barbour, 643.

be in the alternative, as to pay a sum of money, or render A. B. to prison.(q)

And it must be for money *in specie*, therefore, a promise to pay in three good East India bonds,(r) or in cash, or Bank of England notes,(s) is not a promissory note.(1)

(q) *Smith v. Boheme*, Gilb. Ca. L. & E. 93, cited Ld. Raym. 1396.

(r) *Bul. N. P.* 272.

(s) *Bayley*, 11, 6th ed.; *Ex parte Imeon*, 2 Rose, 225; but see 3 & 4 Wm. 4, c. 98, s. 6.

(1) A note payable in current funds, or New York funds, is not negotiable. *Hasbrook v. Palmer*, 2 McLean, 10; *Kirkpatrick v. McCullough*, 3 Humph. 171; *Collins v. Lincoln*, 11 Verm. 268; *Thompson v. Slown*, 23 Wend. 71; *Whiteman v. Childress*, 6 Humph. 303; *Fry v. Rousseau*, 3 McLean, 106; see *Swetland v. Creigh*, 15 Ohio, 118; *Besancon v. Shirley*, 9 Smedes & Marsh. 457; *Cockrill v. Kirkpatrick*, 9 Missouri, 697; *White v. Richmond*, 16 Ohio, 5; *Wilburn v. Greer*, 1 English, 255; *Ogden v. Slade*, 1 Texas, 13; *Flemming v. Nall*, 1 Texas, 246; *Chevallier v. Buford*, Ib. 503.

A bill payable in "currency" is not a bill of exchange. *Faswell v. Kennett*, 7 Miss. 595. So a draft payable in "Arkansas money." *Hawkins v. Watkins*, 5 Pike, 481. So "current rate of exchange to be added." *Philadelphia Bank v. Newkirk*, 2 Miles, 442. See *Little v. Phoenix Bank*, 7 Hill, 359; *Bank of Hamburg v. Johnson*, 3 Rich. 42.

A bill payable in "funds current in the city of New York" was held to be payable in gold and silver, or their equivalent, and was therefore good as a bill of exchange. *Lacy v. Holbrook*, 4 Ala. 88; *Carter v. Penn*, Ib. 140.

A note for a sum certain, payable in cotton at a fixed price, is a promissory note, and may be declared on as such. *Rankin v. Sanders*, 6 How. Miss. 52.

It will be seen upon an examination of the foregoing cases, that many of them are not so irreconcilable as at first sight they may appear. Many of them construe the words current money, New York funds, Arkansas money, used in bills and notes, to mean lawful gold or silver coin of the United States. In Missouri, current funds is held to mean either coin or notes of the Missouri Bank—a bank authorized by the State—and in Texas the terms "bank notes," "good bank notes," or "current bank notes," as employed by them, are held to import in their ordinary acceptation such bank bills only as are redeemable in gold or silver, or such as are equivalent thereto. A contract for the payment of a certain sum in bank notes or other paper currency may or may not be equivalent to that sum in specie. The extent of the obligation depends on the meaning which usage affixes to the terms, at the time the contract was made. Usage gives force and effect to language; and as terms are generally understood in the ordinary transactions of life, so should they be construed by courts of justice. 1 Texas, 246.

As to bills or notes payable in goods or merchandise, see *Jerome v. Whitney*, 7 Johns. 321; *Thomas v. Roosa*, Ibid. 461; *Pray v. Pickett*, 1 Nott & McCord, 254; *Rhodes v. Lindley*, 1 Hamm. Ch. Rep. 51; *Atkinson v. Manks*, 1 Cowen, 691; *Lawrence v. Doherty*, 5 Yerger, 435; *Burns v. Graham*, 4 Cowen, 452; *Wyman v.*

And the sum must be certain, not susceptible of contingent or indefinite additions. Therefore, where an instrument promised to pay J. S. the sum of 65*l.*, with the lawful interest of the same, and all other sums which should be due to him, Lord Ellenborough held that it was not a promissory note, even for the sixty-five pounds.^(t) Nor must the sum payable be subject to indefinite or contingent deductions. Thus, where the defendant promised to pay 400*l.* to the representatives of *J. S., first deducting thereout any interest or [*71] money J. S. might owe to the defendant, it was held no promissory note.^(u)

And for the *payment* of money. Where the instrument contains a stipulation that the money or a portion of it shall be paid by a set-off, it is no promissory note.^(v)

The order or promise must be to pay absolutely and at all events ;(1) and payment must not depend upon a contingency ; for, as observed by Lord Kenyon,^(w) “ It would perplex commercial transactions, if paper securities of this kind were issued into the world, incumbered with conditions and contingencies, and if the person to whom they were offered in negotiation were obliged to inquire when these uncertain events would probably be reduced to a certainty.” Besides, the recognition of conditional promissory notes would make a variety of conditional promises in writing valid, without evidence of consideration, and thus materially infringe on an established and very salutary

(*t*) *Smith v. Nightingale*, 2 Stark. 375 ; *Bolton v. Dugdale*, 4 B. & Ad. 619, E. C. L. R. vol. 24 ; 1 N. & M. 412, S. C.

(*u*) *Smith v. Nightingale*, 2 Stark. Rep. 375, E. C. L. R. vol. 3 ; *Barlow v. Broadhurst*, 4 J. B. Moore, 471 ; and see *Leeds v. Lancashire*, 2 Camp, 205 ; *Bolton v. Dugdale*, 4 B. & Ad. 619, E. C. L. R. vol. 24 ; 1 N. & M. 412, S. C. ; 2 Bligh, 79 ; *Ayre v. Fearnside*, 4 M. & W. 168.*

(*v*) *Davies v. Wilkinson*, 10 Ad. & Ellis, 98, E. C. L. R. vol. 37 ; 2 P. & D. 256, S. C.

(*w*) *Carlos v. Fancourt*, 5 T. R. 482.

Winslow, 2 Fairf. 398 ; *Bailey v. Symonds*, 6 N. Hamp. 159 ; *Smith v. Loomis*, 7 Conn. 110.

As to bills or notes payable in bank notes, see *Keith v. Jones*, 9 Johns. 120 ; *Judah v. Harris*, 19 Ibid. 144 ; *Leiber v. Goodrich*, 5 Cowen, 136 ; *Lange v. Kohne*, 1 McCord, 115 ; *Jones v. Fales*, 4 Mass. 245 ; *McCormick v. Trotter*, 10 Serg. & Rawle, 94 ; *Digbert v. Dumell*, 5 Yerger, 451 ; *Gray v. Donahoe*, 4 Watts, 400 ; 3 Kent's Com. 76.

(1) *Bunker v. Atheam*, 35 Maine, 364.

rule of law.(x) Thus, a note to this effect, "We promise to pay A. B. 116*l.* 11*s.* value received, on the death of George Henshaw, provided he leaves either of us sufficient to pay that said sum, or if we otherwise shall be able to pay it," is not a promissory note within the statute.(y) So, a written engagement to pay a certain sum so many days after the defendant's marriage, is no promissory note, for, possibly, he never may marry.(z) So, a paper, whereby the defendants promised to pay the plaintiffs, or order, the sum of 13*l.*, for value received, with interest at 5*l.* per. cent., "and all fines, according to the rule," cannot be declared on as a promissory note.(a) So, an order payable, "Provided the terms mentioned in certain letters, written by the drawer, were complied with," is no bill.(b) So a note promising to pay, "On the sale or produce of the White Hart, St. Alban's, Herts, and the goods, &c., value received," is not a promissory note, though it be averred that before action brought, the *White Hart and the goods were sold.(c) The following [*72] instrument was held not to be a note: "Borrowed and received of A., the sum of 200*l.* in three drafts, by B., dated as under, payable to us on C., which we promise to pay the said A., with interest." The instrument then specified the drafts, which fell due at a future day. Lord Ellenborough observed, "There can be no doubt that the money was not payable immediately, and that it was not to be paid at all, unless the drafts were honored."(d) So, an order to pay at thirty days after the arrival of the Ship Paragon at Calcutta was held to be no bill of exchange.(e) So, an order to pay "14*l.* 3*s.* out of the fifth payment, when it should be due, and should be allowed by J. S." is no bill of exchange.(f)(1)

(x) See *Pearson v. Garrett*, 4 Mod. 242.

(y) *Roberts v. Peake*, 1 Burr. 323; *Leeds v. Lancashire*, 2 Camp. 205.

(z) *Beardsley v. Baldwin*, 2 Stra. 1151; and see *Pearson v. Garrett*, 4 Mod. 242; Comb. 227, S. C.; which was before the statute 3 & 4 Anne, c. 9.

(a) *Ayrey v. Fearnside*, 4 M. & W. 168.*

(b) *Kingston v. Long*, Bayley 16, 6th ed.

(c) *Hill v. Halford*, 2 B. & P. 413.

(d) *Williamson v. Bennett*, 2 Camp. 417; and see *Clarke v. Perceval*, 2 B. & Ad. 660, E. C. L. R. vol. 22; *Shenton v. James*, 5 Q. B. Rep. 199, E. C. L. R. vol. 48; *Drury v. Macaulay*, 16 N. & W. 146; 16 L. J. 31, Ex.

(e) *Palmer v. Pratt*, 2 Bing. 185, E. C. L. R. vol. 9; 9 Moo. 358; *Clark v. Perceval*, 2 B. & Ad. 660, E. C. L. R. vol. 22; *Worley v. Harrison*, 5 Nev. & M. 173; 3 Ad. & Ell. 669, E. C. L. R. vol. 30, S. C.

(f) *Haydock v. Lynch*, 2 Ld. Raym. 1563.

(1) A certificate by the cashier of a bank, "that C. T. has deposited in this

An instrument in this form, "At twelve months I promise to pay A. B. 500*l.*, to be held by them as collateral security for any moneys now owing to them by M. & M., which they may be unable to recover on realizing the securities they now hold, and others which may be placed in their hands by him," is no promissory note.(g)

But it is not material that the time when the event may happen is uncertain, provided it must happen at some time or other: thus, a note payable on the death of A. B., or of the maker, is good.(h) So, a note payable when a King's ship shall be paid off, has been held to be a good note, the Court of error observing, "The paying off of the ship is a thing of a public nature."(i) But it is said,(k) that the Court below assigned as a reason, that the ship would certainly be paid off one time or other.(l) The contingency, in order to vitiate [*73] the note, as such, must be apparent on the face of the instrument.(m) A promissory note payable with interest, twelve months after notice, is not to be considered as payable on a contingency, and is, consequently, valid.(n)

The happening of the contingency on which the payment of the bill is dependent will not cure the defect.(o)

A note beginning "I, A. B., promise, &c.," and signed A. B., or

(g) *Robins v. May*, 11 Ad. & E. 214, E. C. L. R. vol. 39; 3 Per. & D. 147; 3 Jurist, 1188, S. C.

(h) *Cooke v. Colehan*, 2 Stra. 1217; *Roffey v. Greenwell*, 2 Per. & Dav. 365; 10 Ad. & El. 222, E. C. L. R. vol. 37, S. C.

(i) *Andrews v. Franklin*, 1 Stra. 24; *Evans v. Underwood*, 1 Wils. 262.

(k) And see *Haussoullier v. Hartsink*, 7 T. R. 733; *Dixon v. Nuttall*, 6 C. & P. 320, E. C. L. R. vol. 25; 1 C. M. & R. 307,* S. C.; *Goss v. Nelson*, 1 Burr. 226. "I promise to pay or cause to be paid," is a good note, the alternative expression importing the same thing. *Lovell v. Hill*, 6 C. & P. 238, E. C. L. R. vol. 25.

(l) *Colehan v. Cook*, Willes, 399; 1 Selw. N. P. 375. A note to an infant, payable when he shall come of age, has been held good, if it specify the particular day. *Goss v. Nelson*, 1 Burr. 226; 1 Lord Kenyon, 498, S. C.

(m) *Richards v. Richards*, 2 B. & Ad. 447, E. C. L. R. vol. 22.

(n) *Clayton v. Gosling*, 5 B. & C. 360, E. C. L. R. vol. 11; 3 D. & R. 110, S. C.

(o) *Chitty*, 7th ed. 45; *Hill v. Halford*, 2 B. & P. 413; *Chitty*, 9th ed. 135, 144.

bank, payable twelve months from the first day of May, 1839, with five per cent. interest, until due, per annum, \$3691 63 for the use of R. P. & Co., and payable only to their order upon the return of this certificate," is not a promissory note. *Patterson v. Poindexter*, 6 Watts & Serg. 227.

else C. D., is a good note against A. B., but only evidence *as against* C. D. of a conditional agreement to pay, if A. B. does not.^(p)

In this last case the maker or payer was uncertain: the note, as such, is not available at all, if the payee be uncertain. Thus, where the maker promised to pay to A., or to B. and C. a certain sum, Abbott, C. J., said, "I have no doubt this instrument is not a promissory note within the statute of Anne; for, if a note is made payable to one or other of two persons, it is payable only on the contingency of its not having been paid to the other, and is not a good promissory note, within the statute."^(q)

Upon the same principle, the bill or note must not be made payable out of a particular fund,^(r) for the fund may prove insufficient.⁽¹⁾

^(p) Ferris v. Bond, 4 B. & Ald. 679, E. C. L. R. vol. 6; and see Appleby v. Biddulph, B. N. P. 272, cited Morice v. Lee, 8 Mod. 363; 4 Vin. Ab. 240, pl. 16.

^(q) Blanckenhagen v. Blundell, 2 B. & Ald. 417.

^(r) Jenny v. Herle, 2 Ld. Raym. 1361; 8 Mod. 265; 1 Stra. 591, S. C.; Haydock v. Lynch, 2 Ld. Raym. 1563; Dawkes v. Lord de Loraine, 2 Bla. Rep. 782; 3 Wils. 207, S. C.; Yates v. Grove, 1 Ves. jun. 280; Carlos v. Fancourt, 5 T. R. 482.

(1) It is essential to a bill or note that it be payable in money only, at all events and not out of a particular fund. Atkinson v. Manks, 1 Cow. 691; Cook v. Satterlee, 6 Cow. 108; Waters v. Carlton, 4 Porter, 205; Tucker v. Maxwell, 11 Mass. 143; Wooley v. Sergeant, 3 Halst. 262; Mills v. Kuykendall, 2 Blackf. 47; May v. Lansdown, 6 J. J. Marsh. 170; Van Vacter v. Flack, 1 Smedes & Marsh. 393; Hamilton v. Myrick, 3 Pike, 541; Rice v. Porter, 1 Harr. 440; Wallace v. Dyson, 1 Spears, 127; Strader v. Batchelor, 8 B. Monroe, 168; Warden v. Dodge, 4 Denio, 159; Wilamoice v. Adams, 8 English, 12.

An order of a client on an attorney, to pay money out of any sum collected for him is not a bill of exchange. Crawford v. Cully, Wright, 453. So an order for a certain amount in merchandise is not a bill of exchange. Gwinn v. Roberts, 3 Pike, 72; Bradley v. Morris, 3 Scamm. 182; Carleton v. Brooks, 14 New Hamp. 149. An order to pay over rents accruing up to a specified time, is not a bill of exchange, though the rents were payable in money. Morton v. Naylor, 1 Hill, 583.

An order in this form, "On 1st January, 1836, pay to my order five thousand dollars, for value received, and charge the same to my account for transporting the United States Mail," is not negotiable, so as to entitle the holder to sue in his own name. Reeside v. Knox, 2 Whart. 233. An order drawn upon the treasury by a public officer, for his salary, is not a bill of exchange. Strader v. Batchelor, 8 B. Monroe, 168.

A bill of exchange in form, drawn by one government on another, as the bill drawn by our government on the government of France, for moneys due according to a treaty stipulation, is not and cannot be governed by the law merchant, and

Plaintiff drew upon A., and required him to pay B. 70% per month out of plaintiff's growing subsistence. This was held no bill of exchange: for had plaintiff died, or his subsistence been taken away, the bill would not have been payable.^(s) So, an order from the owner of a ship to the charterer, to pay money on account of freight, is no bill, for the future existence and amount of any debt due for freight, is subject to a contingency.^(t) And the same rule holds if the contingency is expressed on the back of the note by an indorsement made before the note was a perfect instrument.^(u)

[*74] *But the statement of a particular fund in a bill of exchange will not vitiate it, if introduced merely as a direction to the drawee how to reimburse himself: thus, a bill directing the drawee to pay J. S. 9% 10s., "as my quarterly half-pay," was held to be a good bill.^(v)

If the instrument be defective as a bill or note, it still may be evidence of an agreement.^(w)

(s) *Josselyn v. Lacier*, 10 Mod. 294; Fort. 281, S. C.; see *Russell v. Powell*, 14 M. & W. 418.*

(t) *Banbury v. Lissett*, 2 Stra. 1211.

(u) *Leeds v. Lancashire*, 2 Camp. 205.

(v) *Macleod v. Snee*, 2 Str. 762.

(w) As to the proper stamp in such a case, see ante, Chapter iv.

therefore is not subject to protest and consequential damages. *United States v. Bank of the United States*, 5 Howard (U. S.) Rep. 382.

An order drawn in express terms for a particular fund, will operate as an assignment of the fund; but it will not be negotiable, and is not a bill of exchange. *Cowperthwaite v. Sheffield*, 1 Sand. Sup. Ct. Rep. 416.

A bill of exchange, although accepted, does not operate to invest the payee with the character of an assignee of a particular fund, unless drawn on such fund. *Wheeler v. Stone*, 4 Gill. 38.

If the fund described in a bill is certain, and is mentioned only as a means by which the drawee is to be indemnified, the bill is good. *Banck, &c. v. Sanders*, 3 Marsh. 184; *Varner v. Nobleborough*, 2 Greenl. 123; *Kelly v. Mayor, &c.*, 4 Hill. 263; *Wiggin v. Vaught, Cheves*, 91; *Hoyt v. Lynch*, 2 Sandf. Sup. Ct. Rep. 328; *Smith v. Ellis*, 29 Maine, 442; see *West v. Foreman*, 21 Alabama, 400; *Shields v. Taylor*, 25 Mississippi, 143.

*CHAPTER VIII.

[*75]

OF AGREEMENTS INTENDED TO CONTROL THE OPERATIONS OF
BILLS OR NOTES.

VARIOUS SORTS OF AGREEMENTS,	75	EFFECT OF AN AGREEMENT WRITTEN	
EFFECT OF CONTEMPORANEOUS AGREEMENT WRITTEN ON THE INSTRUMENT,	75	ON A DISTINCT PAPER,	76
EFFECT OF AN AGREEMENT SUBSEQUENTLY WRITTEN ON THE INSTRUMENT,	76	AGREEMENT CONTEMPORANEOUS, BUT COLLATERAL,	76
		EFFECT OF A VERBAL AGREEMENT,	76
		AGREEMENT TO RENEW,	77
		AGREEMENT ON BILL MUST BE READ,	77
		PLEADING AN AGREEMENT,	77

SUCH agreements are either WRITTEN or VERBAL.

A WRITTEN agreement is either on the instrument itself or on a distinct paper. Again, a written agreement on the instrument itself, is either contemporaneous with the completion of the bill or note, or it is a subsequent agreement. Once more, even a contemporaneous written agreement may either be parcel of the instrument, or it may be collateral.

A memorandum on a bill or note, made before it is complete, is sometimes considered as part of the instrument, so as to control its operation, and sometimes not.

If the memorandum make the payment contingent, we have seen that it will be incorporated in the note.(a) But, where it is merely directory, as if it points out the place of payment,(b) or be merely the

(a) *Leeds v. Lancashire*, 2 Camp. 205 ; *Hartley v. Wilkinson*, 4 M. & Sel. 25 ; 4 Camp. 127, S. C. Though by way of indorsement, *Leeds v. Lancashire*, ubi supra. A joint and several promissory note had an indorsement in this form, "The within note is given for securing floating advances from the Lincoln and Lindsay Banking Company, to the within named Thomas Smith, Sen. (one of the joint and several makers of the note), with lawful interest for the same, from the respective times when such advances have been or may be made, together with commission, stamps, postages, &c., and all usual charges and disbursements, not exceeding, in the whole, the sum of 100*l.* within mentioned." It was held to be an agreement which could not be read in evidence without an agreement stamp. Sed quare, whether the indorsement were anything more than an explanation of the consideration. *Cholmley v. Darley*, 14 M. & W. 344.* See the Chapter on *Consideration*.

(b) *Exon v. Russell*, 4 M. & Sel. 505.

[*76] expression of an intended courtesy, *as if it intimate a wish that the money lent should not be called in by the payee's executors till three years after his death;(c) or if it import that a collateral security (as the deposit of title deeds) has been given;(d) or be intended only to identify and ear-mark the instrument;(e) it does not affect its operation.

A memorandum made after the note is perfected and delivered is an independent agreement, requiring an agreement stamp. "If," says Lord Ellenborough, "the memorandum was subsequently written, when the note had been perfected and delivered in its absolute state, it could not be considered as a part of that instrument, though it chanced to be inscribed upon the same piece of paper. In that case, it was an agreement by way of defeazance, and it lay upon the defendant to produce it with a proper stamp."(f)

A written agreement, on a distinct paper, to renew, or in other respects to qualify, the liability of the maker or acceptor, is good as between the original parties.(g) Thus, if the drawer agree to indemnify the acceptor against a claim by other parties, for a portion of the sum for which the bill is drawn, and the acceptor afterwards pays those other parties a sum to which the indemnity applies, the acceptor's liability, as between himself and the drawer, will be reduced pro tanto, and he will not be turned round to his cross action on the indemnity.(h)

But a written agreement, though contemporaneous, will not restrain the operation of the bill or note if it be collateral, *e. g.* if other persons besides the parties to the bill or note be parties to it.(i)

No VERBAL agreement can take effect, if contemporaneous with the making of the instrument; for that would be to allow verbal evidence

(c) *Stone v. Metcalf*, 4 Camp. 217; 1 Stark. 53, E. C. L. R. vol. 2, S. C.

(d) *Wise v. Charlton*, 4 Ad. & E. 786, E. C. L. R. vol. 31; 6 Nev. & M. 364; 2 Har. & W. 49, S. C.; *Fancourt v. Thorne*, 15 L. J., Q. B. 344; 9 Q. B. 312, E. C. L. R. vol. 58, S. C.

(e) *Brill v. Crick*, 1 M. & W. 232.*

(f) *Stone v. Metcalf*, 4 Camp. 217; 1 Stark. 53, E. C. L. R. vol. 2, S. C.

(g) *Bowerbranch v. Monteiro*, 4 Taunt. 844.

(h) *Carr v. Stephens*, 9 B. & C. 758, E. C. L. R. vol. 17; 4 Man. & Ryl. 591, S. C.

(i) *Webb v. Spice*, 19 L. J. 34, Q. B., on error in Exchequer Chamber.

to vary a written contract.(k)(1) "Every bill or note," says Parke, J., "imports two things, *value received, and an engagement to pay the amount on certain specified terms. Evidence is [*77]

(k) *Hoare v. Graham*, 3 Camp. 57; *Free v. Hawkins*, 8 Taunt. 92, E. C. L. R. vol. 4; 1 Moore, 28, S. C.; *Woodbridge v. Spooner*, 3 B. & Ald. 233, E. C. L. R. vol. 5; 1 Ch. R. 661, S. C.; *Moseley v. Hanford*, 10 B. & C. 729, E. C. L. R. vol. 21; *Foster v. Jolly*, 1 C. M. & R. 703; * 5 Tyr. 255, S. C.; *Richards v. Thomas*, 1 C. M. & R. 772; * *Holt v. Miers*, 9 C. & P. 191, E. C. L. R. R. vol. 38.

(1) The American cases in affirmance of this point are very numerous. It would incumber a note too much to begin to cite. The circumstances and relations of the parties may always be shown by parol wherever they may be calculated to assist in the interpretation of any doubtful words or clauses in a written contract, but evidence of an agreement or understanding between the parties, or of their declarations at or before the time of the execution of a contract, to add, alter, or vary its legal construction, is universally repudiated as inadmissible. To this rule the only recognized exception is fraud or mistake, which may always be shown when the contest is between the original parties to a negotiable instrument. Mistake cannot of course affect the rights of a third person, a bona fide holder without notice, who took the note or bill for what it appeared on its face. Even fraud as between the original parties can only so far affect the bona fide holder as to throw upon him the burden of proving affirmatively that which the law presumes in general—the consideration which he gave for the note or bill. In Pennsylvania, this exception of fraud has been carried so far as in effect to repeal the rule itself. In *Nill v. Gaw*, 4 Barr, 493, in the Supreme Court in that State, in an action on a postdated check, the defence set up a parol agreement made at the time of its execution, that payment was not to be demanded at maturity, but that time was to be given at the election of the drawee, it was held that such evidence was inadmissible, and no defence to the action. "It has been repeatedly ruled," says Judge Rogers, "that oral testimony is not admissible to contradict, vary, or materially affect, by way of explanation, any written contract. There are some exceptions to this rule, founded in mistake or fraud, but they never have been extended so far as to admit evidence of a distinct, independent parol agreement, which varies, alters, or contradicts the written contract, whether by bond, promissory note, bill of exchange, or by a check which is in the nature of a bill of exchange." In the subsequent case of *Renshaw v. Gans*, 7 Barr, 117, which was not an action on a negotiable instrument, though when the question is as between the original parties, there is no difference between the cases, they laid down the position that fraud, to work an exception to the rule, need not be fraud in the contract itself; but fraud in setting up the writing in opposition to the agreement is equally excepted. "All the cases," says Judge Bell, "show that to pave the way for the reception of oral declaration, it is not necessary to prove a party was actuated by a fraudulent intention at the time of the execution of the writing. His original object may have been perfectly honest and upright; and if, to procure an unfair advantage to himself, he subsequently deny the parol qualification of the written contract, it is such a fraud as will, under the rules, operate to let in evidence of the real intent and final conclusion of the contractors." *Hurst's Lessee v. Kirkbride*, 1 Binn. 616; *Christ v. Dffenbach*, 1 Serg. & Rawle, 464;

admissible to deny the receipt of value, but not to vary the engagement." (l)

(l) *Abbott v. Hendricks*, 1 M. & G. 795, E. C. L. R. vol. 39; *Moseley v. Hanford*, 10 B. & C. 729, E. C. L. R. vol. 21. "The cases," says Maule, J., "show that although a consideration is stated in the note, you may show that it was given for a different consideration or without any consideration at all." *Abbott v. Hendricks*, 1 M. & G. 791, E. C. L. R. vol. 39; 2 Scott, N. R. 183, S. C.; but see *Ridout v. Bristow*, 1 C. & J. 231; * 1 Tyr. 84, S. C., and *Edwards v. Jones*, 2 M. & W. 414; * 5 Dowl. 585; 7 C. & P. 633, E. C. L. R. vol. 32; S. C. In *Pike v. Street*, 1 Dans. & Lloyd, 159; 1 M. & M. 226, E. C. L. R. vol. 22, it was held a good defence to an action against the drawer, that at the time when the plaintiff discounted the bill he verbally agreed, in the event of its being dishonored, not to proceed against the drawer who had indorsed the bill to him. Vide the Chapter on *Transfer*.

Clark v. Partridge, 2 Barr, 13; *Parke v. Chadwick*, 8 Watts & Serg. 98. The Courts in Pennsylvania exercise a mixed jurisdiction of law and equity. Equity is part of the law of that State, and is administered through common law forms. It is unquestionable that where an important term of a contract, and forming a part of its consideration, has been omitted from the writing, equity will naturally incline to refer it to the head of mistake, or if that be precluded by the circumstances, to a design at the time to take advantage subsequently of the omission. It might be said with propriety in such cases, that the evidence is admissible, leaving to the jury the power of drawing the inference from the subsequent setting up of the written contract in opposition to the parol understanding, that it entered into the original intent of the party taking the undue advantage. See *Rearich v. Swinehart*, 11 Penna. St. Rep. 233. It was held, therefore, by the same Court, in *Miller v. Henderson*, 10 Serg. & Rawle, 290, in which it was decided that parol evidence is admissible under the plea of payment to a suit in a bond against a surety, to show that he executed the bond under a declaration by the obligee that his signing was mere matter of form, and that he never should be called on for payment, that it must appear affirmatively that the instrument was executed upon the faith of such representations. "The destruction of a written instrument," says C. J. Tilghman, "by parol evidence, may seem dangerous, and, in fact, it is so. But the community would be in a still worse condition if it were established as an inflexible rule that when a man's hand was once got to an instrument, no matter by what means, the door should be shut against all inquiry. The encouragement to fraudulent villany would be so great, under such a system, that the consequences might be intolerable." Upon the question of fraud see *Stark v. Littlejohn*, 4 Randolph, 368; *Prentiss v. Russ*, 4 Shepley, 30; *Sanford v. Handy*, 23 Wendell, 260; *Holbrook v. Burt*, 22 Pick. 546; *Gooch v. Conner*, 8 Missouri, 391; *McMahon v. Spangler*, 4 Randolph, 51; *Hunt v. Rousmanier*, 8 Wheat. 174; *Fishell v. Bell*, 1 Clark, 37; *Jarvis v. Palmer*, 11 Paige, 650; *Leonard v. Smith*, 11 Metcalf, 330; *Craig v. Baptist Education Society*, 7 B. Monroe, 73; *Young v. Frost*, 5 Gill, 287.

There are some cases, however, which apparently modify the rule in the text, which it may be well to notice.

The reasons which forbid the admission of parol evidence, to alter or explain written agreements, or other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser

An agreement to renew, without more, is an agreement to renew once only.^(m)

(m) *Innes v. Munro*, 1 Exch. Rep. 473.*

of a note of hand. *Susquehanna Co. v. Evans*, 4 Wash. C. C. 480. *Smith v. Barber*, 1 Root, 207. Contra, *Barry v. Morse*, 3 N. Hamp. 132.

The contract of indorsement may be converted by parol evidence into an absolute and unconditional engagement to pay; and it may be explained by the same kind of evidence to mean nothing more than the transfer of the note without recourse to the indorsee. *Patterson v. Todd*, 18 Penna. State Rep. 426; *Bircleback v. Wilkins*, 22 Ibid. 26.

An indorsement of negotiable paper is not regarded in law as a written contract to pay on condition that the usual demand be made and notice given; but from it is implied a contract to pay on such condition, and such implication is liable to be changed by the exhibition of circumstances inconsistent with it, whether shown orally or in writing. The duty of demand and notice is not a part of the contract, but is merely a step in the remedy, which may be waived by the indorser. *Barclay v. Weaver*, 19 Penna. State Rep. 396.

Under a plea of *non est factum*, in an action upon a note, parol evidence is admissible to show the character of the delivery. *Owings v. Grubb*, 6 J. J. Marshall, 31. Parol agreement may show the place where payment was to be demanded. *Brent v. The Bank of the Metropolis*, 1 Peters, 92. So in an action on a note given for a horse, to show that the note was to be returned if the horse died. *Barlow v. Flemming*, 6 Alabama, 146. Where a collateral agreement is made between two indorsers of a note, that they will divide the loss between them, in an action by one of them against the other upon such agreement, parol evidence is admissible to prove the agreement. *Phillips v. Preston*, 5 Howard (U. S.), 278. A written instrument may be contradicted by the party making it, when offered in a suit to which a stranger to the instrument is a party. *Venable v. Thompson*, 11 Alabama, 147.

A promissory note was signed A. B. (for C. D.). It was held that parol evidence was admissible to show that it was intended to be the note of A. B. *Early v. Wilkinson*, 9 Grattan, 68. The date of a note is only descriptive, is not necessary to its validity, and may be explained. *Dean v. De Lizardi*, 24 Mississippi, 424.

A. purchased goods of the plaintiff, and being required to give security, made his promissory note payable to the order of plaintiff; the defendant, being requested, put his name on the back of it, and A. then delivered it to the plaintiff; the plaintiff afterwards indorsed, putting his name above that of the defendant. Held that parol evidence was admissible to explain the circumstances under which the note was executed by A. and the defendant, and indorsed by the plaintiff; that the defendant was liable on the note as original maker or promissor, and that the plaintiff, by afterwards indorsing the note, did not change its character or discharge the defendant. *Baker v. Scott*, 5 Richardson, 305.

In an action to charge as an original promissor, a person who put his name on the back of a note to which he was not a party, parol evidence is admissible to show that he signed as an indorser, and that such was the understanding of the parties at the time. *Lewis v. Harvey*, 18 Missouri, 74.

A defendant has a right at the trial to call on the plaintiff to read any indorsement that may be on the bill.(n)

Though it may be necessary that the agreement affecting the operation of the bill or note should be in writing, it is not necessary in pleading to aver that it is in writing.(o)

[*78]

*CHAPTER IX.

OF THE STAMP.

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IN treating of the Stamp Laws as they affect bills and notes, let us first review the principal statutory enactments, and then the most important decisions of the Courts on this subject; postponing the consideration of the effect, under the Stamp Laws, of altering a bill or note, to a subsequent Chapter, which will show the effect of alteration both at common law and under the Stamp Acts.

(n) *Richards v. Frankum*, 9 C. & P. 221, E. C. L. R. vol. 38. As to agreements by clerks in fraud of their employers, see *Bosanquet v. Foster*, 9 C. & P. 659, E. C. L. R. vol. 38; *Bosanquet v. Corser*, 9 C. & P. 664, E. C. L. R. vol. 38.

(o) *Kearns v. Durell*, 18 L. J. 28, C. P.; 6 C. B. 596, E. C. L. R. vol. 60, S. C. See *Gilbert v. Whitmarsh*, 8 Q. B. Rep. 969, E. C. L. R. vol. 55.

Bills and notes were exempt from any stamp duty till the 22 Geo. 3, c. 33. This act was repealed and followed by several other stamp acts, affecting them, which contain many regulations still in force, though the amount of duty which they impose is altered by the present general stamp act, 55 Geo. 3, c. 184.

The stamps imposed by the latter act *on bills and notes, are as follows:— [^{*79}]

INLAND BILL OF EXCHANGE, draft, or order,(a) to the bearer or to order, either on demand or otherwise, not exceeding two months after date,(b) or sixty days after sight, of any sum of money—				£	s.	d.
Amounting to 40s., and not exceeding 5l. 5s.	.	.	.	0	1	0
Exceeding 5l. 5s., not exceeding 20l.	.	.	.	0	1	6
Exceeding 20l., not exceeding 30l.	.	.	.	0	2	0
Exceeding 30l., not exceeding 50l.	.	.	.	0	2	6
Exceeding 50l., not exceeding 100l.	.	.	.	0	3	6
Exceeding 100l., not exceeding 200l.	.	.	.	0	4	6
Exceeding 200l., not exceeding 300l.	.	.	.	0	5	0
Exceeding 300l., not exceeding 500l.	.	.	.	0	6	0
Exceeding 500l., not exceeding 1000l.	.	.	.	0	8	6
Exceeding 1000l., not exceeding 2000l.	.	.	.	0	12	6
Exceeding 2000l., not exceeding 3000l.	.	.	.	0	15	0
Exceeding 3000l.	.	.	.	1	5	0

Inland Bill of Exchange, draft, or order for the payment to the bearer, or to order, at any time exceeding two months after date, or sixty days after sight,(c) of any sum of money—

Amounting to 40s., and not exceeding 5l. 5s.	.	.	.	0	1	6
Exceeding 5l. 5s., not exceeding 20l.	.	.	.	0	2	0
Exceeding 20l., not exceeding 30l.	.	.	.	0	2	6
Exceeding 30l., not exceeding 50l.	.	.	.	0	3	6

(a) The words "for the payment," seem here omitted.

(b) The value or amount of the stamp upon a bill of exchange depends upon the date expressed upon the face of the bill, not on the time it was actually drawn or issued. *Williams v. Jarrett*, 5 B. & Ad. 32, E. C. L. R. vol. 27; 2 Nev. & M. 42, S. C.

(c) If payable *two months after sight*, the bill must be stamped with the higher rate of duty imposed by the next head. *Sturdy v. Henderson*, 4 B. & Ald. 592, E. C. L. R. vol. 6.

	£.	s.	d.
Exceeding 50%, not exceeding 100%	0	4	6
Exceeding 100%, not exceeding 200%	0	5	0
Exceeding 200%, not exceeding 300%	0	6	0
Exceeding 300%, not exceeding 500%	0	8	6
Exceeding 500%, not exceeding 1000%	0	12	6
Exceeding 1000%, not exceeding 2000%	0	15	0
Exceeding 2000%, not exceeding 3000%	1	5	0
Exceeding 3000%	1	10	0

Inland bill, draft, or order for the payment of any sum of money, though not made payable to the bearer, or to order, if the same shall be delivered *to the [*80] payee, or to some person on his or her behalf—the same duty as on a bill of exchange for the like sum, payable to bearer or order.

Inland bill, draft, or order, for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made payable to the bearer, or to order, or if delivered to the payee, or to some person on his or her behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom—the same duty as on a bill payable to bearer or order on demand, for a sum equal to such total amount.

And, where the total amount of the money thereby made payable shall be indefinite—the same duty as on a bill on demand, for the sum therein expressed only.

And the following instruments shall be deemed and taken to be (d) inland bills, drafts, or orders, for the payment

(d) These and the corresponding provisions relating to promissory notes were introduced to include such instruments as being payable on a contingency or out of a particular fund are not, strictly speaking, either bills or notes. See Chapter vii; *Fairbank v. Bell*, 1 B. & Ald. 39. Where A. having directed B. by letter to pay C. 1500*l.* out of the proceeds of certain unsold goods of A. in B.'s hands, and B. in a letter to C. having agreed to do so (which letter was stamped with an agreement stamp), it was held, that as there was no agreement between A. and B., the first letter was inadmissible in evidence without a bill stamp. *Ibid.* So a letter desiring the correspondent of the writer to pay third persons, or their order, 600*l.* out of the first proceeds of a stock of gunpowder, and to charge the same to account, was held liable to a bill stamp, though it formed part of a subsequent correspondence between the three houses. *Butts v. Swann*, 2 B. & B. 78, E. C. L. R. vol. 6; 4 J. B. Moore, 484, S. C. But unless the order specify a *definite sum*, these provisions do not

of money, within the intent and meaning of this schedule, viz. :

All drafts or orders for the payment of any sum of money, by a bill or promissory note, or for the delivery of any such bill or note, in payment or *satisfaction of any sum of money, where such drafts or orders [^{*81}] shall require the payment or delivery to be made to the bearer, or to order, or shall be delivered to the payee, or some person on his or her behalf.

All receipts given by any banker or bankers, or other person or persons, for money received, which shall entitle, or be intended to entitle, the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

And all bills, drafts, or orders, for the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee, or to some person on his or her behalf.

FOREIGN BILL OF EXCHANGE (or bill of exchange drawn in but payable out of Great Britain), if drawn singly, and not in a set—the same duty as on an inland bill of the same amount and tenor.

Foreign bills of exchange, drawn in sets, according to the custom of merchants, for every bill of each set, where the sum made payable thereby shall not exceed 100*l.* . 0 1 6

And where it shall exceed 100*l.*, and not exceed 200*l.*, 0 3 0

apply, and a bill stamp is not required. Therefore where the consignor of goods gave his consignee this order, "Pay to A. B. the proceeds of a shipment of goods value about 2000*l.* consigned by me to you," and C., by writing, agreed to pay over the full amount of the net proceeds of the goods; it was held, that neither of these instruments required a bill or note stamp. *Jones v. Simpson*, 2 B. & C. 318, E. C. L. R. vol. 9; 3 D. & R. 545, S. C.; and see *Barlow v. Broadhurst*, 4 J. B. Moore, 471; *Crowfoot v. Gurney*, 9 Bing. 372, E. C. L. R. vol. 25; *Hutchinson v. Heyworth*, 1 Per. & D. 266; 9 Ad. & E. 375, E. C. L. R. vol. 36, S. C. A note written by a creditor, at the foot of an account, requesting the debtor to pay that account to A. B., and which the creditor delivered to A. B. for the purpose of his getting in the money for the creditor, is not a bill of exchange or order for payment of money within the Stamp Act. *Norris v. Solomon*, 2 M. & R. 266.

	£	s.	d.
Where it shall exceed 200 <i>l.</i> , and not exceed 500 <i>l.</i> , .	0	4	0
Where it shall exceed 500 <i>l.</i> , and not exceed 1000 <i>l.</i> , .	0	5	0
Where it shall exceed 1000 <i>l.</i> , and not exceed 2000 <i>l.</i> , .	0	7	6
Where it shall exceed 2000 <i>l.</i> , and not exceed 3000 <i>l.</i> , .	0	10	5
Where it shall exceed 3000 <i>l.</i> ,	0	15	0

Exemptions from the preceding and all other Stamp Duties.

All bills of exchange, or bank post bills, issued by the Governor and Company of the Bank of England.

All bills, orders, remittance bills and remittance *certificates, drawn by commissioned officers, masters, [*82] and surgeons in the Navy, or by any commissioner or commissioners of the Navy, under the authority of the act passed in the thirty-fifth year of his Majesty's reign, for the more expeditious payment of the wages and pay of certain officers belonging to the Navy.

All bills drawn pursuant to any former act or acts of Parliament, by the commissioners of the Navy, or by the commissioners for victualling the Navy, or by the commissioners for managing the transport service, and for taking care of sick and wounded seamen, upon, and payable by, the Treasurer of the Navy.

All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside, or transact the business of a banker, within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes.

All bills for the pay and allowance of his Majesty's land forces, or for other expenditures liable to be charged in the public regimental or district accounts, which shall be drawn according to the forms now prescribed, or hereafter to be prescribed, by his Majesty's orders, by the paymasters of regiments or corps, or by the chief pay-

master, or deputy paymaster, and accountant of the army depôt, or by the paymasters of recruiting districts, or by the paymasters of detachments, or by the officer or officers authorized to perform the duties of the paymastership during the vacancy, or the absence, suspension, or incapacity of any such paymaster, as aforesaid; save and except such bills as shall be drawn in favor of contractors, or others, who furnish bread or forage to his Majesty's troops, and who, by their contracts or agreements, shall be liable to pay the stamp duties on the bills given in payment for the articles supplied by them.

*PROMISSORY NOTE(d) for the payment, to the bearer on demand, of any sum of money—	[*83]	£	s.	d.
Not exceeding 1 <i>l.</i> 1 <i>s.</i>		0	0	5
Exceeding 1 <i>l.</i> 1 <i>s.</i> , not exceeding 2 <i>l.</i> 2 <i>s.</i>		0	0	10
Exceeding 2 <i>l.</i> 2 <i>s.</i> , not exceeding 5 <i>l.</i> 5 <i>s.</i>		0	1	3
Exceeding 5 <i>l.</i> 5 <i>s.</i> , not exceeding 10 <i>l.</i>		0	1	9
Exceeding 10 <i>l.</i> , not exceeding 20 <i>l.</i>		0	2	0
Exceeding 20 <i>l.</i> , not exceeding 30 <i>l.</i>		0	3	0
Exceeding 30 <i>l.</i> , not exceeding 50 <i>l.</i>		0	5	0
Exceeding 50 <i>l.</i> , not exceeding 100 <i>l.</i>		0	8	6

Which said notes may be re-issued, after payment thereof,
as often as shall be thought fit.

Promissory Note for the payment, in any other manner
than to the bearer on demand, but not exceeding two
months after date, or sixty days after sight, of any sum
of money—

Amounting to 40 <i>s.</i> , and not exceeding 5 <i>l.</i> 5 <i>s.</i>	0	1	0
Exceeding 5 <i>l.</i> 5 <i>s.</i> , not exceeding 20 <i>l.</i>	0	1	6
Exceeding 20 <i>l.</i> , not exceeding 30 <i>l.</i>	0	2	0
Exceeding 30 <i>l.</i> , not exceeding 50 <i>l.</i>	0	2	6
Exceeding 50 <i>l.</i> , not exceeding 100 <i>l.</i>	0	3	6

These notes are not to be re-issued after being once paid.

(d) It was once held that a promissory note for 11*l.* to A. B. on demand, without the words "or bearer," was a note payable to bearer on demand within this class and re-issuable. *Keates v. Whieldon*, 8 B. & C. 7, E. C. L. R. vol. 15; 2 M. & Ry. 8, S. C. This case, however, was always considered doubtful, and is now overruled. *Cheetham v. Butler*, 5 B. & Ad. 837, E. C. L. R. vol. 27; 2 N. & M. 453, S. C.; *Dixon v. Chambers*, 1 C. M. & R. 845,* 5 Tyr. 202; 1 Gale, 14, S. C.

Promissory Note for the payment, either to the bearer on demand, or in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money—

	£	s.	d.
Exceeding 100l., not exceeding 200l.	0	4	6
Exceeding 200l., not exceeding 300l.	0	5	0
Exceeding 300l., not exceeding 500l.	0	6	0
Exceeding 500l., not exceeding 1000l.	0	8	6
Exceeding 1000l., not exceeding 2000l.	0	10	6
Exceeding 2000l., not exceeding 3000l.	0	15	0
Exceeding 3000l.	1	5	0

These notes are not to be re-issued after being once paid.

[*84] *Promissory Note for the payment, to the bearer or otherwise, at any time exceeding two months after date, or sixty days after sight, of any sum of money—

Amounting to 40s., and not exceeding 5l. 5s.	0	1	6
Exceeding 5l. 5s., not exceeding 20l.	0	2	0
Exceeding 20l., not exceeding 30l.	0	2	6
Exceeding 30l., not exceeding 50l.	0	2	6
Exceeding 50l., not exceeding 100l.	0	4	6
Exceeding 100l., not exceeding 200l.	0	5	0
Exceeding 200l., not exceeding 300l.	0	6	0
Exceeding 300l., not exceeding 500l.	0	8	6
Exceeding 500l., not exceeding 1000l.	0	12	6
Exceeding 1000l., not exceeding 2000l.	0	15	0
Exceeding 2000l., not exceeding 3000l.	1	5	0
Exceeding 3000l.	1	10	0

These notes are not to be re-issued after being once paid.

Promissory Note for the payment of any sum of money by instalments, or for the payment of several sums of money at different days or times, so that the whole of the money to be paid shall be definite and certain, the same duty as on a promissory note, payable in less than two months after date, for a sum equal to the whole amount of the money to be paid :

And the following instruments shall be deemed and taken to be promissory notes, within the intent of this schedule, viz. :

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the bearer or to order, or if the same shall be definite and certain, and not amount in the whole to twenty pounds:

And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum, importing that interest shall be paid for the money so deposited.

Exemptions from Duties on Promissory Notes.

All notes, promising the payment of any sum or sums *of money out of any particular fund, [*85] which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; where the same shall not be made payable to the bearer or to order, and also where the same shall be made payable to the bearer or to order, if the same shall amount to twenty pounds, or be indefinite:

And all other instruments, bearing in any degree the form or style of promissory notes, but which in law should be deemed special agreements, except those hereby expressly directed to be deemed promissory notes.

But such of the notes and instruments here exempted from the duty on promissory notes, shall nevertheless be liable to the duty which may attach thereon, as agreements or otherwise.

Exemptions from the preceding and all other Stamp Duties.

All promissory notes for the payment of money, issued by the Governor and Company of the Bank of England.

PROTEST of any bill of exchange or promissory note for any sum of money—

	£	s.	d.
Not amounting to 20l.	0	2	0
Amounting to 20l., not amounting to 100l.	0	3	0
Amounting to 100l., not amounting to 500l.	0	5	0
Amounting to 500l. or upwards,	0	10	0

	£	s.	d.
Protest of any other kind,	0	5	0
And for every sheet or piece of paper, parchment, or vel- lum, upon which the same shall be written, after the first, a further progressive duty of	0	5	0

It is necessary to observe, that the eighth section of the present general stamp act declares that all the regulations in former stamp acts(*d*) are still in force, so far as the same are applicable to the duties granted by that act. Among these are the following:—

The 31 Geo. 3, c. 25, s. 19, enacts, that unstamped bills, notes, or drafts, shall not be admissible in evidence, or available in law or equity.

[*86] *The same section prohibits the commissioners from stamping any bill or note after it is made.

But the 37 Geo. 3, c. 136, ss. 5 & 6, authorizes the commissioners to restamp any bill or note on which has been affixed a stamp of a wrong denomination, but of value equal or superior to the proper stamp, on payment of a penalty of 10s. if the bill or note be not due, and 10l. if it be.(*e*)

The 43 Geo. 3, c. 127, s. 6, enacts, that every instrument bearing a stamp of greater value than required by law, shall be valid, if of the proper denomination.

And, by the present act, 55 Geo. 3, c. 184, s. 10, it will be seen that though the stamp be of a wrong denomination, if of sufficient value, it will be valid, unless on the face of it specifically appropriated to some other instrument. And in this last case, it is apprehended that a bill or note may be restamped under the 37 Geo. 3, c. 136, ss. 5 and 6.(*f*)

A promissory note, which amounts to a mortgage, may be impressed with the mortgage stamp after it is made.(*g*)

It is sufficient if an instrument be properly stamped according to the law at the time the stamp is affixed, although a higher stamp should have been necessary at the time the instrument was executed.(*h*)

(*d*) Field v. Woods, 7 Ad. & E. 114, E. C. L. R. vol. 34; 2 Nev. & P. 117, S. C.

(*e*) See Bradley v. Bardsley, 15 L. J. 115, Exch.; 3 D. & L. 476, 14 M. & W. 873,* S. C.

(*f*) See Chamberlain v. Porter, 1 N. Rep. 30.

(*g*) Wise v. Charlton, 4 Ad. & E. 786, E. C. L. R. vol. 31; 6 Nev. & M. 364; 2 Har. & W. 49, S. C.

(*h*) Doe v. Whittingham, 4 Taunt. 20; Buckworth v. Simpson, 1 C. M. & R. 834,* Deakin v. Pennial, 2 Ex. Rep. 320.*

From the foregoing and other statutes, it will appear that the following instruments are exempt from duty.

1. All such bills or notes under 40*s.* as may be issued without violating the provisions of the 17 Geo. 3, c. 30, and the 48 Geo. 3, c. 88.

2. Bank of England bills and notes.*(i)*

3. Notes for one pound, one guinea, two pounds, and two guineas, payable to the bearer on demand, issued by the Bank of Scotland, Royal Bank of Scotland, or the British Linen Company in Scotland.*(k)*

4. Bills or notes issued by bankers paying a composition in lieu of stamps, pursuant to 9 Geo. 4, c. 23.*(l)*

5. Bills drawn for the expenses of the army and navy.*(m)*

*6. Checks on bankers.

[*87]

7. Notes of loan societies.*(n)*

The requisites for bringing checks within the exemption have been discussed in the Chapter on CHECKS.

Promissory notes, payable to bearer on demand, made out of Great Britain, cannot be negotiated or paid, unless stamped as notes made in Great Britain, under the penalty of 20*l.**(o)*

The making, issuing, accepting, or paying, any bill, note or draft, not falling within the above exemptions, and not duly stamped, subjects to the penalty of 50*l.**(p)* The 55 Geo. 3, c. 184, s. 29, excepts notes made and payable in Ireland.

Postdating bills or notes, so as to evade the higher rate of duty, subjects to the penalty of 100*l.**(q)*

Notes payable to the bearer on demand, for any sum not exceeding 100*l.*, duly stamped according to the 55 Geo. 3, c. 184, may be reissued after payment, as often as may be thought necessary, without

(i) 55 Geo. 3, c. 184, s. 21; 7 & 8 Vict. c. 32, s. 7. *(k)* Sect. 23.

(l) And see 7 Geo. 4, c. 46, s. 16. *(m)* 55 Geo. 3, c. 184, Sched. part 1.

(n) See 5 & 6 Wm. 4, c. 23; 3 & 4 Vict. c. 110; 5 & 6 Vict. c. 4; 6 & 7 Vict. c. 41; 7 & 8 Vict. c. 54. Although the form of note given by the statute be joint only, yet a joint and several note is within the exemption. *Bradburn v. Whitbread*, 5 M. & G. 439, E. C. L. R. vol. 44; see ante, p. 54.

(o) 55 Geo. 3, c. 184, s. 29.

(p) Sect. 11.

(q) Sect. 12.

a new stamp, *(r)* provided an annual license for that purpose be taken out. *(s)*

Reissuing notes, against the provisions of the act, subjects the person reissuing them to a penalty of 50*l.*, and the duty; and any person knowingly taking them, to a penalty of 20*l.* *(t)* But the payment mentioned in the act, after which bills and notes cannot be re-issued, is a payment at maturity. *(u)*

Issuing reissuable notes, without a license, subjects to the penalty of 100*l.* *(v)* It has been held, under the former acts, that where a bill is made payable to the drawer's own order, and returned to the drawer and paid by him, he may, without a fresh stamp, indorse the bill over to a new party, who may sue the acceptor. *(w)* But it is otherwise if the payee were a *third person. *(x)* Or if the drawer [*88] were the party ultimately liable to pay the bill. *(y)*

As to stamps on foreign bills, see the Chapter on FOREIGN BILLS.

As to the stamps on Irish or Colonial bills, see the same Chapter.

A question sometimes arises as to what shall be deemed such a making within this country as to subject an instrument to the English Stamp Laws. On this subject also, see the Chapter on FOREIGN BILLS.

A bill not duly stamped is not available, nor evidence in law or equity, for any purpose in furtherance of its original design, not even as an admission. *(z)* Defendant indorsed to plaintiff a bill on an

(r) Sect. 14.

(s) Sects. 24, 25, 26, 27, 28; and see 9 Geo. 4, c. 23, ss. 1 and 12.

(t) Sect. 19. *Holroyd v. Whitehead*, 1 Marsh. 128, E. C. L. R. vol. 4.

(u) *Morley v. Culverwell*, 7 M. & W. 174,* by the party primarily liable; see *Bartrum v. Caddy*, 9 Ad. & E. 275, E. C. L. R. vol. 36; 1 Per. & D. 207, S. C.

(v) Sect. 27.

(w) *Callow v. Lawrence*, 3 M. & Sel. 95.

(x) *Beck v. Robley*, 1 H. B. 89; and see *Graves v. Key*, 3 B. & Ad. 313, E. C. L. R. vol. 23.

(y) *Lazarus v. Cowie*, 3 Q. B. Rep. 465, E. C. L. R. vol. 43.

(z) *Wilson v. Vysar*, 4 Taunt. 288; *Jardine v. Payne*, 1 B. & Ad. 663, E. C. L. R. vol. 20; *Cundy v. Marriott*, 1 B. & Ad. 696, E. C. L. R. vol. 20. But an unstamped instrument is admissible to prove an agreement illegal. *Coppock v. Bower*, 4 M. & W. 361.* And the Court of C. P. have allowed an unstamped bill to be given in evidence to negative by anticipation a plea of payment. *Smart v. Nokes*, 13 L. J. 79, C. P.; 6 M. & G. 911, E. C. L. R. vol. 46, S. C. Sed quære.

insufficient stamp, in payment of goods sold ; plaintiff delayed in presenting it for payment, and the acceptor became unable to pay. Defendant proved that the bill would have been paid if presented at maturity. Held, that the bill never operated as a suspension of the debt, and that the plaintiff's laches did not discharge the defendant.(a) So the indorser of a bill drawn on an insufficient stamp, is not discharged from his debt by neglect of the indorsee to present or give him notice of dishonor.(b) But an instrument not duly stamped may be looked at for a collateral purpose. Action for money lent : the plaintiff's witnesses proved that plaintiff had lent defendant 40*l.*, and that defendant had given him a promissory note on unstamped paper. The defendant's case was, that plaintiff had inveigled him to drink, and that the transaction was fraudulent. The note was produced. Lord Ellenborough—"The note certainly cannot be received in evidence as a security, or to prove the loan of the money, but I think it may be looked at by the jury as a contemporary writing to prove or disprove the fraud imputed *to the plaintiff." The [*89] note was put in, and had very much the appearance of having been written by a drunken man. Verdict for the defendant.(c) So, it is no defence on a prosecution for forgery, that the instrument was not duly stamped.(d) So, it has been held, that if A. and B. enter into a written agreement, duly stamped, and afterwards enter into another written agreement on the same subject-matter, but inconsistent with the first, and not stamped, though the plaintiff cannot give the second agreement in evidence, it may be looked at by the Court to prove that the first agreement was rescinded.(e) But where the acceptor of the bill required the drawer, who was an illiterate person, to take his second acceptance at six months, in lieu of payment, and the drawer having assented, the acceptor's son wrote the second bill on the back of the first, and the drawer and acceptor signed the second bill, and then the acceptor's son drew a line through the acceptance on the first bill ; it was held, in an action on the first

(a) *Wilson v. Vysar*, 4 Taunt. 288.

(b) *Cundy v. Marriott*, 1 B. & Ad. 696, E. C. L. R. vol. 20 ; *Wilson v. Vysar*, 4 Taunt. 288 ; *Plimley v. Westley*, 2 Bing. N. Ca. 249, E. C. L. R. vol. 29 ; 2 Scott, 423 ; 7 Hodges, 324, S. C.

(c) *Gregory v. Fraser*, 3 Camp. 454.

(d) *Rex v. Hawkswood*, Bayley, 91, 6th ed. ; 3 East, P. C. 955 ; *Rex v. Teague*, Bayl. 574, 6th ed. ; 2 East, P. C. 79, S. C.

(e) *Reed v. Deere*, 7 B. & C. 261, E. C. L. R. vol. 14 ; see *Swears v. Wells*, 1 Esp. 317.

bill by the drawer against the acceptor, that the second bill could not be submitted to the jury for the purpose of enabling them to judge whether the cancelling of the original acceptance were with the assent of the plaintiff.(f)

The 3 & 4 Wm. 4, c. 97, ss. 16 and 17, empowers the commissioners of stamps from time to time to change the dies on giving proper notice. A bill or note stamped with a superseded die is to be considered as unstamped. This objection need not be pleaded.(g) A bill accepted in blank on a proper die, but filled up after the die is changed, is void.(h)

Though the commissioners are in general prohibited, by the 31 Geo. 3, c. 25, s. 19, from stamping any bill or note after it has been made, yet, if so stamped, it may nevertheless be valid in the hands of an indorsee.(i) Lord Kenyon observed, "that though the commissioners might have exceeded their duty in stamping a bill against the positive directions of the act of Parliament, still, that being stamped, [*90] he thought it was become *a valid instrument, and a Judge at *Nisi Prius* could not inquire how and at what time it was stamped. Much inconvenience might arise, and a great check be put upon paper credit, if the objection was to be allowed; for how was it possible for a man, taking a bill in the ordinary course of business, to know whether it had been stamped previous to the making of it or not." The authority of the preceding case has been recognized in a late case;(k) but it is there intimated that the decision would have been different, had the plaintiff been the original party to the instrument, or had it carried on the face of it evidence that it was stamped after it came into the plaintiff's hands, or after it was issued. And it is conceived that if it can be distinctly shown, that the plaintiff, who sues on a bill, became the holder while it was unstamped, he cannot recover on it.

(f) *Sweeting v. Halse*, 9 B. & C. 365, E. C. L. R. vol. 17; 4 M. & Ry. 287, S. C. It was held in *Jones v. Ryder*, 4 M. & W. 32,* that a promissory note improperly stamped could not be received in evidence to take a case out of the Statute of Limitations.

(g) *Dawson v. McDonald*, 2 M. & W. 26.*

(h) *Abrahams v. Skinner*, 12 Ad. & E. 763, E. C. R. L. vol. 40.

(i) *Wright v. Riley*, Peake, 173; *Roderick v. Hovill*, 3 Camp. 103; *Rapp v. Allnut*, Ibid. 106.

(k) *Green v. Davies*, 4 B. & C. 235, E. C. L. R. vol. 10; 6 D. & R. 306, S. C. As to post stamping a cognovit, see *Rose v. Tomblinson*, 3 Dowl. 49.

The reservation of interest on a bill or note does not, in any case, make a larger stamp necessary; for the object of the legislature was to impose a pro rata stamp duty on the sum actually due at the time of taking the security, and not upon what might become due in future for the use of the money.^(l) Although interest be reserved from a day prior to the date of the instrument.^(m)

Though postdating a bill, so as to evade the proper duty, subjects, as we have seen, to a heavy penalty, yet, if it be thus postdated, it will not require the higher stamp,⁽ⁿ⁾ for the word date in the Stamp Act means the date expressed on the face of the bill.

An instrument, which in point of law is but an agreement, requires where the matter thereof is of the value of 20*l.* a stamp of 2*s.* 6*d.* only.^(o)

An agreement requiring, when made, a stamp of 1*l.*, is now on payment of the penalty well stamped with a 2*s.* 6*d.* stamp.^(p)

A note reciting that deeds had been deposited as a security, does not require a mortgage stamp.^(q)

*After payment of money into Court on the whole declaration, the defendant cannot object to the insufficiency of the stamp.^(r) This point can scarcely arise in the superior Courts since the New Rules of pleading. [**91*]

The objection to the want of a stamp should in general be taken before the instrument is read. But where the defect requires extrinsic evidence to show it, as where a check has been postdated, the instrument is to be read, and the ground of objection afterwards proved as part of the defendant's case.^(s)

(*l*) *Pruessing v. Ing*, 4 B. & Ald. 204, E. C. L. R. vol. 6.

(*m*) *Wills v. Noot*, 4 Tyrw. 726.

(*n*) *Upstone v. Marchant*, 2 B. & C. 10, E. C. L. R. vol. 9; 3 D. & R. 198, S. C.; *Peacock v. Murrell*, 2 Stark. 558, E. C. L. R. vol. 3; *Williams v. Jarrett*, 5 B. & Ad. 32, E. C. L. R. vol. 27; 2 N. & M. 49, S. C.; *Duck v. Braddyll*, M'Clel. 235.

(*o*) 55 Geo. 3, c. 184; 7 Vict. c. 21.

(*p*) *Buckworth v. Simpson*, 1 C. M. & R. 834; * *Doe v. Whittingham*, 4 Taunt. 20; *Deakin v. Pennial*, 17 L. J., C. P. 217; 2 Exch. 320.*

(*q*) *Fancourt v. Thorne*, 9 Q. B. Rep. 312, E. C. L. R. vol. 58.

(*r*) *Israel v. Benjamin*, 3 Camp. 40.

(*s*) *Field v. Woods*, 7 Ad. & Ell. 114, E. C. L. R. vol. 34; 2 Nev. & P. 117, S. C.

The absence of a stamp on a bill or note cannot be pleaded, unless the plea show that the instrument cannot be made good by being stamped before the trial.(t)

[*92]

*CHAPTER X.

OF THE CONSIDERATION.

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If a man seek to inforce a simple contract, he must, in pleading, aver that it was made on good consideration, and must substantiate that allegation by proof. But to this rule bills and notes are an exception. It is never necessary to aver consideration for any engagement on a bill or note, or to prove the existence of such consideration, unless a presumption against it be raised by the evidence of the adverse party, or unless it appear that injustice will be done to the defendant if the plaintiff recover. In the case of simple contracts, the law presumes there was no consideration till a consideration appear; in the

(t) Bradley v. Bardsley, 15 L. J. Exch. 115; 3 D. & L. 476; 14 M. & W. 873,* S. C.; see, however, Lazarus v. Cowie, 3 Q. B. Rep. 465, E. C. L. R. vol. 43.

case of contracts on bills or notes, a consideration *is presumed [*93] till the contrary appear, or at least appear probable.(a)(1)

(a) To obtain the usual decree in a creditor's suit, it is not sufficient for the plaintiff to put in an acceptance of the testator proved as an exhibit. Quære, whether any evidence should be given of the consideration. Keaton v. Lynch, 1 Y. & Col. N. S. 437.* And where an account is directed by a Court of Equity to be taken of dealings between an attorney and his client, it is not sufficient that the attorney produced bills and notes given by the client to him; he must prove the consideration. Jones v. Thomas, 2 Y. & Col. 498.*

(1) A promissory note imports a consideration, and none need be proved unless it be impeached. Middlebury v. Case, 6 Verm. 165; Schoonmaker v. Roosa, 17 Johns. 301; Jerome v. Whitney, 7 Ibid. 321; Mims v. Whiddon, 2 Bailey, 451; Horn v. Fuller, 6 N. Hamp. 511; Goshen Turnpike v. Hurtin, 9 Johns. 217; Camp v. Tompkins, 9 Conn. 545; McMahon v. Crockett, Minor, 362; Mandeville v. Welch, 5 Wheat. 277; Hunley v. Lang, 5 Porter, 154; Thompson v. Armstrong, 5 Alabama, 383.

The consideration of a promissory note is inquirable into between the original parties. Slade v. Halsted, 7 Cowen, 322; Pearson v. Pearson, 7 Johns. 26; Parish v. Stone, 14 Pick. 198; Barnet v. Offerman, 7 Watts, 130; Geiger v. Cook, 3 Watts & Serg. 266.

A promissory note, given for a void patent right, is without consideration, notwithstanding the vendor believed, at the time of the sale, that the patent was valid. Dickinson v. Hall, 14 Pick. 217; Higgins v. Strong, 4 Blackf. 182.

The maker of a note is not precluded from showing want of consideration by the fact that the note was made to defraud creditors, the payee being conusant of that intent. Weaver v. Pierce, 24 Pick. 141.

This last case it will be difficult to reconcile with the dictates of sound policy, if it accords with the principles settled by the cases. That principle is, that *in pari delicto potior est conditio defendentis*. If a party can make out his case or his defence without showing the fraud, it cannot be objected to him by the other party who is also a particeps. Here the case of the plaintiff is made out by the production of the note. It is prima facie evidence of consideration. The defendant shows want of consideration, and in so doing, certainly the actual reason why the note was given must appear. Suppose he succeeds in making out, that there was no consideration without disclosing the fraud, the plaintiff may contradict that evidence by showing that there was a consideration, to wit, an engagement to hold against creditors for the use of the maker, though that consideration was an intended fraud. It is a mistake to put such a case on the same footing as an honest accommodation note. It has a consideration sufficient to sustain it as between the parties, though it is void as to third parties. See Murphey v. Hubert, 10 Penna. State Rep. 58; which was indeed the case of an executed grant, but the difference does not seem to be material. "Courts of justice do not sit to extricate a rogue from his toils. To enable a party to show a secret trust in the face of an absolute deed, the purpose must have been an honest one, else, by secret fraudulent device, a dishonest man would be sure never to lose, and he has the chance of gaining. He may accomplish his fraudulent design, and then he is sure to get back his property, or, what is

The defendant is not permitted to put the plaintiff on proof of the consideration which the plaintiff gave for the bill, unless the defendant can make out a *prima facie* case against him, by showing that the bill was obtained from the defendant, or from some intermediate party, by undue means, as by fraud, or force,^(b) or that it was lost, or that it was originally infected with illegality.⁽¹⁾

It was formerly held, that the defendant could call on the plaintiff to prove consideration, by showing the bill to be an accommodation bill, or that the defendant received no value.^(c) But it is now definitively settled, after consideration *by all the Judges, that mere
[*94] absence of consideration received by the defendant will not

(b) As to a note obtained by duress of goods, see *Kearns v. Durell*, 6 C. B. Rep. 596, E. C. L. R. vol. 60.

(c) See *Heath v. Sansom*, 2 B. & Ad. 291, E. C. L. R. vol. 22; *Duncan v. Scott*, 1 Camp. 100; *Grant v. Vaughan*, 3 Burr. 1516; *King v. Milsom*, 2 Camp. 5; *Pater-son v. Hardacre*, 4 Taunt. 114; *Thomas v. Newton*, 2 C. & P. 606, E. C. L. R. vol. 12; *De la Chaumette v. Bank of England*, 9 B. & C. 208, E. C. L. R. vol. 17; *Bas-sett v. Dodgin*, 10 Bing. 40, E. C. L. R. vol. 25; 3 M. & Scott, 417, E. C. L. R. vol. 30, S. C.; *Simpson v. Clark*, 2 C., N. & R. 342; 1 Gale, 237, S. C. It was formerly necessary, in order to enable the defendant to put the plaintiff on proof of consideration, that the defendant should have given the plaintiff notice to prove consideration. *Paterson v. Hardacre*, 4 Taunt. 114; *Bayley*, 6th ed. 474-500. It is now, however, settled, that notice to prove consideration is not necessary. *Mann v. Lent*, 1 M. & M. 240, E. C. L. R. vol. 22; 10 B. & C. 877, E. C. L. R. vol. 21, S. C. *Heath v. Sansom*, 2 B. & Ad. 291, E. C. L. R. vol. 22; *Baily v. Bidwell*, 13 M. & W. 75.* It was, however, before the new rules, often prudent to give notice: "For it is," says Lord Tenterden, "matter of comment if no notice were given, or if it were not given at a reasonable time." *Mann v. Lent*, 1 M. & M. 240, E. C. L. R. vol. 22; 10 B. & C. 877, E. C. L. R. vol. 21, S. C. It was formerly held, that where the consideration given by the plaintiff is disputed, and a notice to that effect has been given, the plaintiff must go into his whole case in the first instance, and cannot reserve the proof of consideration as an answer to the defendant's case. *Delauney v. Mitchell*, 1 Stark. 439, E. C. L. R. vol. 2; *Humbert v. Ruding*, Chitty, 9th ed. 651; *Spooner v. Gardiner*, R. & M., N. P. C. 86; *Best, C. J.*, in C. P. But now, in all the Courts, the plaintiff is allowed to prove the handwriting, and make out a *prima facie* case, and afterwards in answer to the defendant's case, to prove consideration. R. & M. 255, n. If, however, he call witnesses to prove consideration in the first instance, he will not be allowed, after the defendant's case has closed, to call other witnesses for the same purpose. See *Browne v. Murray*, R. & M. 254.

the same thing, keep it for his family. This would be affording encouragement to such frauds. On the contrary, it is the policy of common sense and common law, to environ a person with all possible perils, and to make it appear that honesty is the best policy."

(1) Seeley v. Engell, 17 Barbour's S. C. Rep. 530.

entitle him to call on the plaintiff to prove the consideration which the plaintiff gave. "There is," says Lord Abinger, delivering the judgment of the Court of Exchequer, "a substantial distinction between bills given for accommodation only, and cases of fraud, inasmuch as in the former case it is to be presumed that money has been obtained upon the bill. If a man comes into Court without any suspicion of fraud, but only as the holder of an accommodation bill, it may fairly be presumed that he is a holder for value. The proof of its being an accommodation bill, is no evidence of the want of consideration in the holder. If the defendant says, 'I lent my name to the drawer for the purpose of his raising money upon the bill,' the probability is, that money was obtained upon the bill. Unless, therefore, the bill be connected with some fraud, and a suspicion of fraud be raised from its being shown that something has been done with it, of an illegal nature, as that it has been clandestinely taken away, or has been lost or stolen (in which cases the holder must show that he gave value for it), the onus probandi is cast upon the defendant." (d)(1)

(d) *Mills v. Barber*, 1 Mees. & W. 425; * 5 Dowl. 77; 2 Gale, 5, S. C.; *Percival v. Frampton*, 2 C. M. & R. 180; * 3 Dowl. 748; *Whittaker v. Edmunds*, 1 M. & R. 366, E. C. L. R. vol. 17; 1 Ad. & E. 638, E. C. L. R. vol. 28, S. C.; *Jacob v. Hungate*, 1 M. & R. 445, E. C. L. R. vol. 17. It has been held by the Court of Exchequer, a mere *admission on record* is not sufficient to put the plaintiff on proof that he is a holder for value, but that the presumption against his title must be raised by evidence before the jury. *Edmonds v. Groves*, 2 Mees. & W. 642; * 5 Dowl. 775, S. C.; and see *Smith v. Martin*, 9 M. & W. 304.* The Court of Queen's Bench, however, have held otherwise. *Bingham v. Stanley*, 1 G. & D. 237; 2 Q. B. Rep. 117, E. C. L. R. vol. 42, S. C.

(1) If the indorser of a promissory note proves that it was issued fraudulently by the maker, the holder may be called on to show what consideration he gave for it. *Holme v. Karsper*, 5 Binn. 469; *Thompson v. Armstrong*, 7 Alabama, 256; *Woodhull v. Holmes*, 10 Johns. 231; *Knight v. Pugh*, 4 Watts & Serg. 445; *Jarden v. Davis*, 5 Whart. 338; *McClintick v. Cummins*, 2 McLean, 98; *Bertrand v. Barkman*, 8 English, 150; *Catlin v. Hansen*, 1 Duer, 309; *The Exchange Bank v. Monteith*, 17 Barbour, S. C. Rep. 171; *Wilson v. Lasier*, 11 Grattan, 477.

Fraud or want of consideration is no defence for either the maker or accommodation indorser of a promissory note, as against a bona fide holder for value, to whose possession it came before maturity in the due course of trade, without notice; but where a note was purchased under such circumstances at a discount, it will be held to have been negotiated in the way of trade only to the amount advanced by the purchaser. *Holeman v. Hobson*, 8 Humph. 127.

Where a promissory note, indorsed by the payee for the accommodation of the maker, is negotiated by the latter in violation of an agreement between them, the holder cannot recover against such payee, unless he received the note in good faith,

If the defendant plead that the note was made on an illegal consideration, and that the plaintiff gave no value, and the plaintiff put the whole plea in issue, it will be sufficient for the defendant to prove the illegality, which will cast on the plaintiff the burden of proving consideration.^(e) And it is conceived that in a case of fraud the defendant will equally cast the burden of proving consideration on the plaintiff, by proving so much of the plea as alleges that he, the defendant, was defrauded of the bill.^(f)

But the defendant is in all cases at liberty to show affirmatively, by his own witnesses, absence or failure of consideration, where on the issues raised that would be a defence.

It should seem, on general principles, that no bill, note, or check, [^{*95}] ^{*given by the maker or acceptor to the payee, as a gift inter vivos, can be enforced between these parties.} Thus, where a bill of exchange was accepted by the defendant, as a present to the payee, who indorsed it to the plaintiff for a small sum advanced to him, Lord Ellenborough held, that the plaintiff was only entitled to recover so much as he had advanced on the bill.^(g) The effect of a gift of a negotiable instrument, payable to bearer, should seem on principle to be this: As between the donor and the donee, the donor cannot recover the bill back, but the donee cannot sue him upon it; as between the donee and the other prior parties to the bill, they are liable to him. If the bill be not transferable, or be payable to order and not indorsed, it is conceived that the effect of a gift of it is to vest the legal property in the paper in the donee, who, however, must recover from prior parties in the donor's name.

The same general rules, as apply to the nature of the consideration for other simple contracts, are also applicable to the various contracts

(e) *Baily v. Bidwell*, 13 M. & W. 73.*

(f) *Ibid.*: but see *Brown v. Philpot*, 2 Mood. & Rob. 285.

(g) *Nash v. Brown*, Chitty, 9th ed. 74; and see *Holiday v. Atkinson*, 5 B. & C. 501, E. C. L. R. vol. 11; 8 D. & R. 163, S. C.; *Easton v. Prachett*, 4 Tyrwh. 472; 1 C. M. & R. 798; * 3 Dowl. 472; 1 Gale, 33, S. C. in error; 2 C. M. & R. 542; * 1 Gale, 250.

for a valuable consideration and without notice of the arrangement. *Small v. Smith*, 1 Denio, 583.

An indorser of a note for the accommodation of the maker and without consideration, and that fact being known to the indorsee when he took the bill, is notwithstanding liable to the indorsee: and even if the indorsee takes the note after it is due. *Brown v. Mott*, 7 Johns. 361.

on a bill or note. It may suffice to observe here, for the sake of the unprofessional reader, that a consideration is, in general, either some detriment to the plaintiff, sustained for the sake or at the instance of the defendant, or some benefit to the defendant^(h) moving from plaintiff. Natural affection is not a sufficient consideration to support a simple contract.

If a man give his acceptance to another, that will be a good consideration for a promise, or for another bill or acceptance, though such first acceptance is, after all, unpaid.⁽ⁱ⁾ And, therefore, cross acceptances for mutual accommodation, are respectively considerations for each other.^{(k)(1)}

A previous debt due to the holder of a negotiable instrument is a good consideration: and it should seem, at least where the bill is payable at a future time, places the holder in the same situation as if he had made fresh advances on the *bill;^(l) for the remedy [*96] for the previous debt is suspended till maturity of the bill.

A fluctuating balance may form a consideration for a bill.^(m) Where a banker's acceptances for his customer exceeded the cash balance in his hands, and accommodation acceptances were deposited by the customer with the banker as a collateral security; it was held, that, whenever the acceptances exceeded the cash balance, the bankers

(h) It is not necessary that the consideration should move to the defendant personally; if it moves to a third person by his desire or acquiescence, that is sufficient. Therefore, the debt of a third person is a good consideration to support a contract on a bill payable at a future day. *Sowerby v. Butcher*, 2 C. & M. 368; * 5 Tyr. 320, S. C.; vide *infra*, p. 96.

(i) *Rose v. Sims*, 1 B. & Ad. 521, E. C. L. R. vol. 20.

(k) *Cowley v. Dunlop*, 7 T. R. 565; *Buckler v. Buttivant*, 3 East, 72; *Rose v. Sims*, 1 B. & Ad. 521, E. C. L. R. vol. 20.

(l) See *Perceval v. Frampton*, 2 C. M. & R. 180; * 3 Dowl. 784, S. C.; *Foster v. Pearson*, 1 C. M. & R. 849; * 5 Tyr. 255, S. C.; but see *De la Chaumette v. Bank of England*, 9 B. & C. 208, E. C. L. R. vol. 17; and *Vallance v. Siddel*, 6 Ad. & E. 932, E. C. L. R. vol. 33; 2 N. & P. 78, S. C.; see *ante*, p. 28.

(m) *Pease v. Hirst*, 10 B. & C. 122, E. C. L. R. vol. 21; 5 M. & Ry. 89, S. C.; *Collenridge v. Farquharson*, 1 Stark. 259, E. C. L. R. vol. 2; *Richards v. Macey*, 14 M. & W. 484; * and for a bond, *Henneker v. Wigg*, 4 Q. B. Rep. 792, E. C. L. R. vol. 45; and see *Cholmley v. Darley*, 14 M. & W. 344.*

(1) Where cross notes are made and specifically exchanged by the makers, each note is the proper debt of the maker thereof, and its holder is a purchaser for value. *Dowe v. Schutt*, 2 Denio, 621.

held the collateral bills for value.(n) Where bills or notes are deposited as a security for the balance of an account current, the successive balances form a shifting consideration for the bill. ^r Thus, where A. and Co., bankers in the country, being pressed by the plaintiffs, B. and Co., bankers in town, to whom they are indebted, to send up any bills that they can procure, transmit for account an accommodation bill accepted by the defendant; when the bill becomes due the balance is in favor of A. and Co., but the bill is not withdrawn, and afterwards the balance between the houses turns considerably in favor of B. and Co., the plaintiffs, and is so when A. and Co. become bankrupts, B. and Co. are entitled to recover against the defendant, the accommodation acceptor.(o)(1)

A debt due from a third person is a good consideration for a note(p)

(n) *Bosanquet v. Dudman*, 1 Stark. 1, E. C. L. R. vol. 2; and see *Bolland v. Bygrave*, 1 R. & M. 271.

(o) *Attwood v. Crowdie*, 1 Stark. 483, E. C. L. R. vol. 2; see *Woodroffe v. Hayne*, 1 Car. & Payne, 600, E. C. L. R. vol. 12.

(p) *Popplewell v. Wilson*, 1 Stra. 264; *Coombs v. Ingram*, 4 D. & R. 211, E. C. L. R. vol. 16; *Sowerby v. Butcher*, 2 C. & Mees. 372;* 4 Tyr. 320, S. C.; *Garnet v. Clarke*, 11 Mod. 226; *Ridout v. Bristow*, 1 C. & J. 231;* 1 Tyr. 84, S. C.; *Wilders v. Stevens*, 15 L. J. 108, Exch.; 15 M. & W. 208,* S. C.; and see *Lechmere v. Fletcher*, 1 C. & M. 623;* *Baker v. Walker*, 14 M. & W. 465;* *Walton v. Mascall*, 14 L. J. 54, Exch.; 13 M. & W. 453,* S. C.; *Cook v. Long*, Car. & Marsh. 510. At least, if the note be payable at a future day, for then the note amounts to

(1) A note given in settlement of a doubtful claim, is founded upon a sufficient consideration without regard to the validity of the claim. *Russell v. Cook*, 3 Hill, 504.

A promise to forbear, for six months, to sue a third person, on a just cause of action, is a valid and sufficient consideration for a promissory note. *Jennison v. Stafford*, 1 Cushing, 168.

Forbearance to prosecute a legal claim and the compromise of a doubtful right, are both sufficient considerations to support a promissory note. *Austell v. Rice*, 6 Georgia, 472. It is no defence to a suit on the note, that such claim could not have been maintained at law, if no fraud or concealment was practised in obtaining the note; but if the note was given in consequence of a fraudulent concealment of material facts, the payee cannot recover. *Stewart v. Ahrenfeldt*, 4 Denio, 189; *Bullock v. Agburn*, 13 Alabama, 346.

In a suit upon a promissory note, made by the defendant, in consideration of the plaintiff's forbearance to seize certain property on attachment against his debtor, the onus of proving that the debtor had, at the time, no interest in the property, and that therefore the note was without consideration, is upon defendant. *Rood v. Jones*, 1 Dougl. 188.

A release from a legal arrest is a good consideration for a note. *Waterman v. Barratt*, 4 Harrington, 311.

*payable at a future day; and so is a debt due from the defendant and a third person.(q)(1) [*97]

A judgment debt is a good consideration for a note payable at a future day; for it imports an agreement on the part of the judgment creditor to suspend proceedings on the judgment till the maturity of the note.(r)

A moral obligation may be a sufficient consideration for a bill or note. Thus, where a bankrupt, after his bankruptcy, gave a promissory note to the plaintiff, one of his creditors, for part of his debt, it was held that the note was given on a good consideration.(s)(2)

A note given by the purchaser of an estate to the vendor for the purchase-money, though the contract be void by the Statute of Frauds, is made on sufficient consideration.(t)

Between immediate parties—that is, between the drawer and acceptor, between the payee and drawer, between the payee and maker of a note, between the indorsee and indorser, the only consideration is that which moved from the plaintiff to the defendant, and the absence or failure of this is a good defence to an action. Thus, where a bill was drawn in the regular course of trade, and delivered to the payee's agent, before the consideration was given, and the payee's

an agreement to give time to the original debtor, and that indulgence to him is a consideration to the maker. Secus if the original debtor is dead, and has no representative. *Nelson v. Serle*, 4 M. & W. 795;* reversing *Serle v. Waterworth*, 4 M. & W. 9;* 6 Dowl. 684, S. C. But if the note be payable immediately, it is conceived that the pre-existing debt of a stranger would not be a consideration, unless credit had been given to the original debtor at the maker's request.

(q) *Heywood v. Watson*, 4 Bing. 496, E. C. L. R. vol. 13; 1 M. & P. 268, S. C.

(r) *Baker v. Walker*, 14 Mees. & W. 465.*

(s) *Trueman v. Fenton*, Cowp. 544; and see *Brix v. Braham*, 1 Bing. 281, E. C. L. R. vol. 8; 8 Moore, 261, S. C.

(t) *Jones v. Jones*, 6 M. & W. 84.*

(1) Where a note is given by one man, at the request of another, to a third person, in a suit between the maker and payee, it is not essential to the validity of the note to show a consideration as between him at whose request it was made and the maker. *Horn v. Fuller*, 6 N. Hamp. 511.

(2) An expectation, on the part of the payee, that the maker would marry her, is not a sufficient consideration for a promissory note. *Raymond v. Sellick*, 10 Conn. 480.

A promissory note, the only consideration of which is the love and affection of the maker to the payee, will not create a valid obligation against the maker or his representatives, either at law or in equity. *Smith v. Kittredge*, 21 Vermont, 238.

agent, who was to have paid the consideration, failed, the payee could not recover against the drawer.^(u) But, between remote parties—for example, between payee and acceptor, between indorsee and acceptor, between indorsee and remote indorser, two distinct considerations, at least, must come in question: first, that which the defendant received for his liability; and, secondly, that which the plaintiff gave for his title. An action between remote parties will not fail unless there be absence or failure of both these considerations.^(v) And if any intermediate holder between the defendant and the plaintiff gave value for the bill, that intervening consideration will sustain the plaintiff's title.^(w)

[*98] *Thus it is no defence to an action by an indorsee for value against an acceptor, that the acceptor received no value.^(x) Nor on the other hand, that though the acceptor received value, the indorsee gave none. On the same principle, if the acceptance were without consideration, and the plaintiff, the indorsee, knew it, he can recover no more than he gave for the bill;^(y) for, suppose the bill to be for 100%, and that the indorsee gave 60% for it, if he could recover 100% from the accommodation acceptor, the acceptor having recovered that sum of the drawer, the drawer might recover back 40% from the indorsee as money received to the drawer's use.^(z)(1)

(u) *Puget de Bras v. Forbes*, 1 Esp. 117; *Jeffries v. Austen*, 1 Stra. 674; *Jackson v. Warwick*, 7 T. R. 121. In *Munroe v. Bordier*, 19 L. J. 133, C. P., it seems to be held, that the payee who takes a bill bona fide for value from a person to whom the drawer had intrusted the bill, but who parts with it against his instructions, acquires a title. *Sed quære*.

(v) *Robinson v. Reynolds*, 2 Q. B. Rep. 196, E. C. L. R. vol. 42. *Quære*, effect of notice by drawer to acceptor not to pay.

(w) *Hunter v. Wilson*, 19 L. J. 8, Exch.; 4 Ex. 489,* S. C.

(x) *Collins v. Martin*, 1 Bos. & Pul. 651.

(y) *Wiffen v. Roberts*, 1 Esp. 261.

(z) *Jones v. Hibbert*, 2 Stark. 304, E. C. L. R. vol. 3.

(1) The consideration of a promissory note taken before due, cannot be inquired into in a suit between the bona fide holder and maker, unless the note is void in its creation. *Baker v. Arnold*, 3 Caines, 279; *Vallett v. Parker*, 6 Wend. 615; *Woods v. Hynes*, 1 Scam. 103.

The indorsee who takes the note after it is due, takes it subject to all the equities between the original parties arising from the note, including want or failure of consideration. *Sylvester v. Crapo*, 15 Pick. 92; *Thompson v. Hale*, 6 Pick. 259; *Ayer v. Hutchins*, 4 Mass. 370; *Wilson v. Holmes*, 5 Ibid. 543; *Rice v. Goddard*, 14 Pick. 293; *Barnet v. Offerman*, 7 Watts, 130.

In a suit in the name of the payee of a note not negotiable, for the use of an

The entire failure of the consideration has the same effect as its original and total absence. A. appointed B. his executor and gave him a promissory note, payable on demand, for 100*l.*, in consideration of the trouble he would have in the office of executor after A.'s death. B., however, died first; but his executors brought an action on the note against A. It was held that as the consideration for the note had totally failed, the action was not maintainable.(a)

It is no defence to an action by an indorsee for value against an acceptor or other person, who has received no consideration, that, at the time the plaintiff took the bill, he knew the defendant had received no value;(b) unless, indeed, the plaintiff took it of a person who held it for a particular purpose, and was therefore guilty of a breach of duty in transferring it to the plaintiff, and the plaintiff, at the time of taking it, were cognizant of the circumstances.(c) If a message be sent comprising facts, the communication of which would impugn the title to a bill, there is no presumption that the message was delivered; that must be proved.(d)

(a) *Solly v. Hinde*, 2 C. & M. 516;* 6 C. & P. 316, E. C. L. R. vol. 25, S. C.; *Wells v. Hopkins*, 5 M. & W. 7.*

(b) *Smith v. Knox*, 3 Esp. 47; *Charles v. Marsden*, 1 Taunt. 224; *Fentum v. Pocock*, 5 Taunt. 193, E. C. L. R. vol. 1; 1 Marsh. 14, S. C.; *Bank of Ireland v. Beresford*, 6 Dow, 237; and see *Poplewell v. Wilson*, 1 Stra. 264; and *Wiffen v. Roberts*, 1 Esp. 261.

(c) See the Chapter on TRANSFER.

(d) *Middleton v. Barned*, 4 Ex. Rep. 241.*

innocent indorsee against the maker, the defendant may set up want of consideration. *Long v. Long*, 1 Morris, 43.

When a promissory note has been assigned but not indorsed, proof by the maker that there was no consideration, or that the note was fraudulently obtained by the payee, is admissible. *Calder v. Billington*, 15 Maine, 398.

A note absolutely void, as for an illegal consideration, is void in the hands of an innocent indorsee for a valuable consideration without notice. *Lucas v. Waul*, 12 Smedes & Marsh. 157. A negotiable note, given for a gambling debt, is void, even in the hands of a bona fide holder for value. *Unger v. Boas*, 13 Penna. State Rep. 601.

The maker of a negotiable note, appearing on the face of it to have been given in consideration of the transfer of a patent right, which afterwards proved to be of no value, cannot set up this want of consideration as a defence to an action by a bona fide indorsee. *Goddard v. Lyman*, 14 Pick. 268.

It seems that in Mississippi, the indorsee of a note in all cases takes it subject to the equities existing against it in the hands of the assignor. *Ragan v. Gray*, 27 Miss. 645.

Where a defendant can insist on a total want of consideration as a defence, he may also set up its partial absence or failure, as an answer pro tanto. Thus, in an action by the drawer of a bill for 19*l.* 5*s.*, [*99] payable to his own order, against *the acceptor, it appearing that the bill was accepted for value as to 10*l.*, and as an accommodation to the plaintiff as to the residue, Lord Ellenborough held, "that although with respect to third persons the amount of the bill might be 19*l.* 5*s.*, yet as between these parties it was an acceptance to the amount of 10*l.* only."*(e)*

But the money as to which the consideration fails must be of a specific ascertained amount, for the jury cannot, in an action on a bill or note, assess by way of set-off the damages arising from a breach of contract, but the defendant must be left to his cross-action. Drawer against the acceptor of a bill; the plaintiff agreed to let a house to the defendant for twenty-one-years, and in consideration of 500*l.*, to be paid by three bills, to be drawn by the plaintiff and accepted by the defendant, agreed to execute a lease for that term. The bill in question, and two others, were drawn and accepted accordingly, and the defendant was immediately let in possession; but the plaintiff refused to execute the lease. It was argued, therefore, that the consideration had failed. But Lord Ellenborough, and afterwards the Court, on a motion for a new trial, held, that it was no defence to the action, that the defendant was bound to pay the bills, and might have his remedy on the agreement for non-execution of the lease.*(f)* Where the consideration for an acceptance was goods sold, and the vendor forcibly retook possession, the consideration was held not to have failed.*(g)* So, where a bill or note is given for goods sold, or work done, the price, amount, and quality of the goods, or work, cannot be disputed in an action on the bill.*(h)* So, where work had been done by the plaintiff for the defendant, for which the plaintiff charged the defendant 63*l.*, and the defendant paid the plaintiff 43*l.*,

(e) Darnell v. Williams, 2 Stark. 166, E. C. L. R. vol. 3; Barber v. Backhouse, Peake, 61; Clark v. Lazarus, 2 M. & G. 167, E. C. L. R. vol. 40; 2 Scott, N. R. 391, S. C.

(f) Moggeridge v. Jones, 14 East, 486; 2 Camp. 38, S. C.; Spiller v. Westlake, 2 B. & Ad. 155, E. C. L. R. vol. 22; Mann v. Lent, 10 B. & C. 877, E. C. L. R. vol. 21; Grant v. Welchman, 16 East, 207; Cuff v. Browne, 5 Price, 297.

(g) Stephens v. Wilkinson, 2 B. & Ad. 220, E. C. L. R. vol. 22; see also Jones v. Jones, 6 M. & W. 84;* and Lomas v. Bradshaw, 19 L. J. 273, C. P.

(h) Morgan v. Richardson, 7 East, 482, n.; 3 Smith, 487, S. C.; Tye v. Gwynne, 2 Camp. 346; Obbard v. Betham, 1 M. & M. 483, E. C. L. R. vol. 22.

in money, and gave him a bill for the remaining 20*l.*; it is no defence to an action by the plaintiff against the defendant on the bill that the work done was not worth 43*l.*(*i*)

And, where the amount for which the consideration fails is unliquidated, a bill in equity for an injunction to restrain an action on the bill of exchange and for an account cannot be maintained.(*k*)(1)

*But, if fraud can be shown, it is otherwise as between the parties, for there is then no contract. Defendant gave plain- [*100]
tiff a promissory note for some pictures. It was proposed to prove, that the sum for which the note was given infinitely exceeded the value of the pictures. Lord Ellenborough—"I will not admit the evidence for the purpose of reducing the damages, by showing that the pictures were of an inferior value; but, if you can, by the inadequacy of the value, and other circumstances, prove fraud on the part of the plaintiff, so as to show that there was *no contract at all*, the evidence will be admissible: if it fall short of that, it will be unavail-

(*i*) *Tricky v. Larne*, 6 M. & W. 278.*

(*k*) *Glennie v. Imri*, 3 Y. & C. 436.*

(1) The failure of consideration, either in whole or in part, may be set up as a defence between the original parties, or any other than a bona fide holder without notice. *Tillotson v. Grapes*, 4 N. Hamp. 444; *Earl v. Page*, 6 N. Hamp. 447; *Pryor v. Coulter*, 1 Bailey, 517; *Cook v. Mix*, 11 Conn. 432; *Denniston v. Bacon*, 10 Johns. 198; *Amherst Academy v. Cows*, 6 Pick. 427; *Payne v. Cutler*, 13 Wend. 605; *Barns v. Finch*, 2 Root, 53; *Spalding v. Vandercook*, 2 Wend. 431; *Burton v. Stewart*, 3 Ibid. 236; *Rogers v. McKnight*, 4 J. J. Marsh. 154; *Johnson v. Titus*, 2 Hill, 606; *Lattin v. Vail*, 17 Wend. 188; *Scudder v. Andrews*, 2 McLean, 464; *Washburn v. Picott*, 3 Dev. 390; *Campbell v. Brown*, 6 How. Miss. 106; *Jenness v. Parker*, 24 Maine, 289; *Stone v. Fowle*, 22 Pick. 166; *Ferguson v. Oliver*, 8 Smedes & Marsh. 332.

That a partial failure of consideration is no defence, see *Jordan v. Jordan*, Dudley, Geo. 181; *Hinton v. Scott*, Ibid. 245; *Scudder v. Andrews*, 2 McLean, 464; *Washburn v. Picott*, 3 Dev. 390; *Kernodle v. Hunt*, 4 Blackf. 57; *Wentworth v. Goodwin*, 27 Maine, 150; *Chase v. Weston*, 12 N. Hamp. 413.

Contra, *Moore v. Lanham*, 3 Hill (South Carolina), 299; *Sumpter v. Welsh*, 1 Brevard, 539; *Smith v. Ackerman*, 5 Blackf. 541; *Purkett v. Gregory*, 2 Scam. 44; *Barr v. Baker*, 9 Missouri, 850; *Griffey v. Payne*, 1 Morris, 68; *Hammet v. Emerson*, 27 Maine, 308; *Coburn v. Ware*, 30 Maine, 202.

In an action on a bill or note, the defendant cannot show a partial failure of consideration to reduce the damages, if the *quantum* to be deducted is of an uncertain and unliquidated amount, and there has been no attempt to repudiate the contract or restore the consideration. *Pulsifer v. Hotchkiss*, 12 Conn. 234; *Drew v. Towle*, 7 Foster, 412.

ing.”(l) So, if a horse is warranted, a check is given, and the horse turn out unsound, the breach of the warranty is no answer to an action on the check; but, if the seller knew of the unsoundness, there is fraud; there was no contract, and no action lies on the check.(m)

An accommodation bill is a bill to which the acceptor, drawer, or indorser, as the case may be, has put his name, without consideration,(n) for the purpose of benefiting or accommodating some other party who is to provide for the bill when due.(o) A party who procures another to lend his acceptance, thereby engages either himself to take up the bill, or else within a reasonable time before the bill becomes due to provide the accommodation acceptor with funds for so doing, or, lastly, to indemnify the accommodation acceptor against the consequences of non-payment.(p) And, therefore, where the drawer of an accommodation bill a week before the bill became due, handed over bank notes to the accommodation acceptor, it was held that he could not himself revoke this payment, and that his bankruptcy before the bill became due did not amount to a revocation.(q)(1)

(l) *Solomon v. Turner*, 1 Stark. 51, E. C. L. R. vol. 2.

(m) *Lewis v. Cosgrave*, 2 Taunt. 2.

(n) As to his remedy for the costs of an action brought against him, see post, Chapter xxxii.

(o) Bills drawn specifically, the one against the other, for the same amount, are not in this sense accommodation bills. See the Chapter on *Bankruptcy*. *Burdon v. Benton*, 9 Q. B. Rep. 843, E. C. L. R. vol. 58; 16 L. J. 353, Q. B., S. C.; see also *King v. Phillips*, 12 Mees. & W. 705.*

(p) *Reynolds v. Doyle*, 1 M. & G. 753, E. C. L. R. vol. 39; 2 Scott, N. R. 45, S. C.

(q) *Yates v. Hoppe*, 19 L. J. 180, C. P. Had the payment been a fraudulent preferment, it would of course have been otherwise.

(1) If the maker gets an indorsed note discounted, the transaction on its face shows that it was indorsed for the accommodation of the maker. *Wallace v. Branch Bank*, 1 Alabama, 565. If a prior indorser offer a note to be discounted on his own account, the transaction imports upon its face that the subsequent indorsement was made for the accommodation of the prior indorser. *Mauldin v. Branch Bank*, 2 Alabama, 502.

An accommodation indorsement need not be exclusively for the benefit of the indorsee, but may be for the mutual accommodation of the drawer and the indorsee. *Farrar v. Gregg*, 1 Richardson, 378.

Indorsers of promissory notes, indorsed for the use and accommodation of the maker, are co-sureties, and the last indorser cannot recover more than a contributive share against a previous indorser. *Douglas v. Waddle*, 1 Hamm. 413. *Contra*, *Youngs v. Ball*, 9 Watts, 139. The last indorser of a note, who pays the amount

The consideration or contract on a bill or note must not be in fraud either of the defendant or third persons; for fraud totally avoids all contracts, both in law and equity. Thus, as we have just seen, if a man sells goods, warranting them, and *take a bill or note in payment, and the warranty turn out false, and it be proved that [*101] he knew it at the time of sale, he cannot recover on the instrument.(r)

So, where the plaintiff had distrained goods of the defendant on the premises of the plaintiff's tenant, and the defendant, to get rid of the distress, accepted the bill in question, it appearing that there was no rent due at the time of the distress, Best, J., left it to the jury to say, whether the plaintiff had not falsely represented to the defendant that the rent was due, in order to induce him to give his acceptance, and that, if so, the acceptance was fraudulently obtained, and the defendant was entitled to a verdict.(s) So, if by fraudulent representations a man induces another to give him for a business more than it is worth, and take a bill in payment, he cannot recover on the bill.(t) But where the defendant insists on fraud as a defence, he must altogether repudiate the contract and retain no benefit under it.(u) And he must now plead the fraud specially.

Equally unavailing is the instrument, if it were given in fraud of

(r) *Lewis v. Cosgrave*, 2 Taunt. 2.

(s) *Grew v. Bevan*, 3 Stark. 134, E. C. L. R. vol. 3.

(t) *Archer v. Bramford*, 3 Stark. 175, E. C. L. R. vol. 3.

(u) *Ibid.*

to the holder, may recover it against any prior indorser, whether the note was indorsed by all for the accommodation of the maker or not. *Ibid.* *Williams v. Basson*, 11 Ohio, 62; *Cathcart v. Gibson*, 1 Richardson, 10. See *Hunt v. Armstrong*, 5 B. Monroe, 399; *Stiles v. Eastman*, 1 Kelly, 205; *Bank of the U. S. v. Beime*, 1 Grattan, 234; *Sherrod v. Rhodes*, 5 Alabama, 683.

A. procured the discount of two notes, one indorsed by B., and the other by B. and C., for the accommodation of A. When they fell due, A. procured a renewal by giving one note for the amount indorsed by B. & C., but the order of their indorsements being changed: held, that it was for the jury to determine whether or not such change in the order was intended to change their liabilities. *Allison v. Purdy*, 6 Barr, 501.

If one of two joint payees and indorsers of a note discounted for the accommodation of the maker die before the note falls due, his representatives are not liable to the holder for any part of the amount. *Kennedy v. Carpenter*, 2 Whart. 344.

An accommodation indorser of a note to be discounted in bank may, before the note is discounted, recede from his agreement and direct the bank not to receive the note; and such indorser will not be liable to a third person who takes the note with notice. *Dogan v. Dubois*, 2 Richardson, Eq. Rep. 85.

third persons. An insolvent proposed to compound with his creditors, but the plaintiffs, being creditors, refused to execute the deed of composition, unless the insolvent gave them a promissory note for the residue of his debt to them. He accordingly did so, without the knowledge of the other creditors, and the plaintiffs and the rest of the creditors then signed the composition deed. The note was held void, as a fraud on the other creditors.^(v)(1) But if the insolvent pay the bill or note when due to the holder, he cannot recover back from the creditor the money so paid.^(w) And the note is equally void, if given, not by the insolvent, but by a third person. So, the note, being given with a fraudulent intention, would have been void, though the composition had never been effected.^(x) And any better security than the other creditors have, though for the same amount, if taken without their knowledge, is void as a fraud on them. "The real question is," says Le Blanc, J., "whether one creditor be put in a better situation than he stipulated for with the other creditors, [*102] *and it is immaterial whether that be done by receiving more money, or that which is meant to procure him more money; namely, a better security for the same sum."^(y) A compounding creditor cannot split his demand, and compound for part, and afterwards sue for the residue, unless he acquaint the other creditors with his proceeding. Therefore, where the plaintiff held two bills, drawn by the insolvent, both due, one for 400*l.*, the other for 156*l.* 19*s.* 10*d.*; and expecting that the acceptor would pay the first, inserted in the schedule attached to the composition deed the amount of the second only as his debt, it was decided that he could not afterwards sue the insolvent on the first bill.^(z) So, if the agreement of composition

(v) *Cockshott v. Bennett*, 2 T. R. 763; *Knight v. Hunt*, 5 Bing. 432, E. C. L. R. vol. 15; 3 M. & P. 18, S. C.; *Bryant v. Christie*, 1 Stark. 329, E. C. L. R. vol. 2; and see *Took v. Tuck*, 4 Bing. 224, E. C. L. R. vol. 13; 12 J. B. Moore, 435, E. C. L. R. vol. 22.

(w) *Wilson v. Ray*, 10 Ad. & E. 82, E. C. L. R. vol. 37; 2 Per. & Dav. 253, S. C., overruling *Turner v. Hoole*, 1 D. & R., N. P. Ca. 27.

(x) *Wells v. Girling*, 1 B. & B. 447, E. C. L. R. vol. 55; 3 J. B. Moore, 79, S. C., E. C. L. R. vol. 4.

(y) *Leicester v. Rose*, 4 East, 372, overruling *Feise v. Randall*, 6 T. R. 146.

(z) *Britten v. Hughes*, 5 Bing. 460, E. C. L. R. vol. 15; 3 M. & P. 77, S. C., overruling, perhaps, *Payler v. Homersham*, 4 M. & Sel. 423; and see *Holmer v. Viner*, 1 Esp. 132; *Cecil v. Plaistow*, 1 Aust. 202.

(1) A note given by a bankrupt to a creditor for his consent to the bankrupt's discharge, is void from illegality of consideration, though given after his discharge. *Rice v. Maxwell*, 13 Smedes and Marsh. 289.

contain a stipulation that all securities shall be given up, if the compounding creditor holds bills drawn by the defendant and accepted by a third person, and he afterwards receives the amount of these bills from the acceptor, he must refund the money to the insolvent.(a) But he may retain money so received, if the agreement of composition contained no stipulation for the surrender of securities.(b) A creditor who holds a bill, and accepts a composition, impliedly engages that the bill is in his own hands. If, therefore, an indorsee of the bill afterwards compels the compounding debtor to pay the bill, the latter may recover the amount from the compounding creditor as money paid to his use,(c) unless the debtor made the payment voluntarily to a holder who was a mere agent of the original creditor, and known by the debtor to be so.(d) If the creditors of an insolvent compound with him, and take notes of hand for the amounts of their respective compositions, and one creditor in addition to his note of hand fraudulently and clandestinely take a further security, his dealing with the insolvent is one entire transaction, and he cannot recover, even on the promissory note.(e)

So, if a man becomes surety for another for the price of goods—as, for example, by joining him in a joint and several note, and the party to whom the surety is responsible conceals from him a stipulation for an additional sum, which it is secretly agreed between himself and the principal, that the *principal shall pay in liquidation of an old debt, that is a fraud on the surety, and releases [*103] him from his engagement.(f)

But where a fraud has been practised on the maker or acceptor, an indorsee for value without notice may, nevertheless, recover against him. Thus we have seen, that though a partner fraudulently use the names of his copartners, they will all be bound to pay an innocent indorsee.(g) So, in an action by the indorsee against the maker of a note thirteen years old, the defendant obtained a rule nisi to set aside a judgment by default, on an affidavit that he, the defendant, was

(a) *Stock v. Mawson*, 1 B. & P. 286.

(b) *Thomas v. Courtnay*, 1 B. & Ald. 1.

(c) *Hawley v. Beverly*, 6 M. & G. 221, E. C. L. R. vol. 46.

(d) *Gibson v. Bruce*, 5 M. & G. 399, E. C. L. R. vol. 44.

(e) *Howden v. Haigh*, 11 Ad. & E. 1033, E. C. L. R. vol. 39.

(f) *Pidcock v. Bishop*, 3 B. & C. 605, E. C. L. R. vol. 10; 5 D. & R. 505, E. C. L. L. vol. 16, S. C.

(g) *Ante*, p. 33.

swindled out of the note. An affidavit being made on the other side, that the plaintiff took the note bona fide, and gave a valuable consideration for it, the Court held, that, *however improperly it might have been obtained*, a third person, who took it fairly and gave a consideration for it, was entitled to recover, and they discharged the rule.^(h) A., by false representations, induced B. to sign his name to a blank stamped paper, which A. afterwards secretly filled up as a promissory note for 100*l.*, and induced C. to advance him 100*l.* upon it. A. was indicted for defrauding C. Held, that C. had his remedy against B. on the note, and that the fraud, therefore, not being upon C., but upon B., the indictment was not sustained by the evidence.⁽ⁱ⁾

The consideration given for a bill or note must not be illegal. It is said that the test, whether a contract be contaminated with an illegal transaction is this: Does the plaintiff require any aid from the illegal transaction to establish his case?^(k) Considerations or contracts are illegal, either, first, at common law, or secondly, by statute.

Considerations illegal at common law are the following:—*First, Such as violate the rules of religion or morality.* Though the law does not pretend to enforce religious or moral obligations as such, yet it seizes every opportunity of countenancing them; and, therefore, will not assist a man whose claim for redress is founded on their violation. *Ex turpi causâ non oritur actio.* “Justice,” says Lord Mansfield, “must be drawn from pure fountains.” Thus, for example, a bond or note given in consideration of future illicit cohabitations is void, but [104] past cohabitation is not an illegal consideration so as to avoid a deed, though it is not sufficient to support a promise.^(l) So, the rent of lodgings knowingly let for the purpose of prostitution, is an illegal consideration.^(m) A wager as to the sex of a third person is illegal, because it tends to indecent evidence, to injure the feelings of the individual, and disturb the peace of society.⁽ⁿ⁾ So is a wager

(h) *Morris v. Lee*, 2 Raym. 1396; 1 Stra. 629, S. C.; Bayley, 6th ed. 509.

(i) *Rex v. Revett*, Bury Summer Assizes, 1829, coram Garrow, B.

(k) *Simpson v. Bloss*, 7 Taunt. 246, E. C. L. R. vol. 2; 2 Marsh. 542, E. C. L. R. vol. 4, S. C.

(l) *Binnington v. Wallis*, 4 B. & Ald. 651, E. C. L. R. vol. 6; *Gibson v. Dickie*, 3 M. & Sel. 463; *Nye v. Moseley*, 6 B. & C. 133, E. C. L. R. vol. 13; 9 D. & R. 165, S. C.; *Beaumont v. Reeve*, 15 L. J. 141, Q. B.; 8 Q. B. 483, E. C. L. R. vol. 55, S. C.

(m) *Girardy v. Richardson*, 1 Esp. 13; *Howard v. Hodges*, Sel. N. P. 7th ed. 68.

(n) *De Costa v. Jones*, Cowp. 729.

as to whether an unmarried woman had borne, or would have, a child.(o) And any bill or note founded on such illegal considerations would be void.

The second sort of agreements, illegal at common law, are *such as contravene public policy*. It is said by Best, C. J.,(p) that if it be merely doubtful whether an agreement be at variance with the public interest, it is not void; it must be clearly and indubitably in contravention of public policy. A contract in general restraint of trade, as not to carry on a particular business anywhere in England, is illegal and void; though an agreement not to trade within a specific distance of a particular place, or not with certain customers, is good.(q) A contract in general restraint of marriage is void,(r) as, a bond given by a widow conditional for the payment of a sum of money if she should marry again.(s) And it makes no difference that the restraint is only for a limited period, as, for six years.(t) An undertaking for reward to procure a marriage between two parties is void.(u) A contract tending to the injury of the revenue, by evading or violating the custom and excise laws, is illegal.(v) But, if a trader sell goods with the *mere knowledge* that the purchaser intends to make an illegal use of them, without in any way lending his aid to the *effectuation [*105] of the unlawful purpose, he may sustain an action on the contract.(w) Considerations impeding the course of public justice, as dropping a criminal prosecution for a felony or a public misdemeanor, or suppressing evidence, are illegal considerations.(x)(1) But it has

(o) *Ditchburn v. Goldsmith*, 4 Camp. 152.

(p) *Richardson v. Mellish*, 2 Bing. 229, E. C. L. R. vol. 9; 9 J. B. Moore, 435, E. C. L. R. vol. 17, S. C.

(q) Co. Litt. 206, b. u. 1; *Hunlock v. Blacklowe*, 2 Saund. 156, n. 1; *Mitchel v. Reynolds*, 1 P. Wms. 181; 10 Mod. 130, S. C.; *Davis v. Mason*, 5 T. R. 118; *Ward v. Byrne*, 5 M. & W. 548; * 3 Jurist, 1175, S. C. Where the covenant is not to carry on business within two districts, one small and reasonable, and the other large and unreasonable, it is divisible. See *Mallan v. May*, 11 Mees. & W. 653; * *Green v. Price*, 13 M. & W. 695.*

(r) *Lowe v. Peers*, 4 Burr. 2225.

(s) *Baker v. White*, 2 Vern. 215.

(t) *Hartley v. Rice*, 10 East, 22.

(u) *Hall v. Potter*, 3 Lev. 411; *Roberts v. Roberts*, 3 P. Wms. 66; Com. Dig. Chancery, 3 Z. 8.

(v) *Biggs v. Lawrence*, 3 T. R. 454; *Vandyk v. Hewitt*, 1 East, 97.

(w) *Hodgson v. Temple*, 5 Taunt. 181, E. C. L. R. vol. 1.

(x) *Nerot v. Wallace*, 3 T. R. 17; *Fallowes v. Taylor*, 7 T. R. 475; *Edgecombe v. Rodd*, 5 East, 294.

(1) A note given in consideration that the payee would stop a prosecution for a supposed felony, instituted against the maker, and not appear as a witness against

been held that compounding a private misdemeanor is a good consideration for a note.(y) A wager on the result of a criminal prosecution is illegal.(z) And a note given after conviction to the prosecutor, for the expenses of the prosecution, the amount of which are settled by the Court, is legal.(a) So, though the particulars of the arrangement are not communicated to the Court and sanctioned by them.(b) And the substitution of a good bill for a forged one, at the instance of the forger, if unaccompanied with any stipulation to stifle a prosecution for forgery, is not illegal.(c) Contracts respecting the sale of public offices are for the most part void at common law,(d) as well as by statute. Any contract tending to cause a neglect of duty in a public officer, is illegal. Thus, though the 6 Geo. 2, c. 31, authorizes parish officers to take security from the putative father of a bastard child to indemnify the parish, it is not lawful for them to take an absolute promissory note for a sum certain, and such a note is void. "It is a shocking consideration," observes Lord Ellenborough, "that by means of such a security as this, the parish officers, who have a public duty imposed upon them to take care that the father shall make a proper provision for the maintenance of the child, acquire an interest that the child should live as short a time as possible."(e) Contracts with a public enemy are illegal; and a bill drawn by an alien enemy on his debtor here, and indorsed to the plaintiff, a British subject resident in the hostile country, cannot be recovered on, though the plaintiff do not sue till the return of peace, and though he were resident at the time of taking the bill, in the hostile country.(f) But where a British prisoner in France drew a bill on an English subject, and indorsed it to the plaintiff, then an alien enemy, it was held that,

(y) *Drage v. Ibberson*, 2 Esp. 643; and see *Coppock v. Bower*, 4 M. & W. 361.*

(z) *Evans v. Jones*, 5 M. & W. 77.*

(a) *Beeley v. Wingfield*, 11 East, 46; see *Keir v. Leeman*, 9 Q. B. Rep. 394, E. C. L. R. vol. 58.

(b) *Kirk v. Strickwood*, 4 B. & Ad. 421, E. C. L. R. vol. 24; 1 N. & M. 275, S. C.; and see *Baker v. Townshend*, 1 J. B. Moore 120, E. C. L. R. vol. 4.

(c) *Wallace v. Hardacre*, 1 Camp. 45.

(d) *Richardson v. Mellish*, 2 Bing. 229, E. C. L. R. vol. 9; 9 J. B. Moore, 435, S. C.

(e) *Cole v. Gower*, 6 East, 110.

(f) *Willison v. Patteson*, 7 Taunt. 440, E. C. L. R. vol. 2.

him, is founded on an illegal consideration and is invalid. *Swan v. Chandler*, 8 B. Monroe, 97; *Clark v. Ricker*, 14 N. Hamp. 44; *The Commonwealth v. Johnson*, 3 Cushing, 454; *Gardner v. Maxey*, 9 B. Monroe, 90; *Hinesburgh v. Sumner*, 9 Verm. 23.

after the *return of peace the plaintiff might recover.(g) And [*106] a bill drawn by a British prisoner, in favor of an alien enemy, cannot be enforced by the payee.

Among the considerations, illegal by statute, are the following:—

1. Usury. It will be more convenient to discuss the nature and consequences of usury in the Chapter on INTEREST.

2. Gaming considerations. The stat. 16 Car. 2, c. 7, avoided all securities, *written* or *verbal*, given to secure any sum of money exceeding 100*l.* lost at play.(h) And the 9 Anne, c. 14, expressly avoided all *written* contracts for any sum of money won at play, or by betting at play, or lent for playing or betting,(i) and by subjecting to the animadversion of criminal justice, all winnings above 10*l.*, it impliedly avoided all contracts to enforce them also.(k)

Both acts avoided judgments for gaming debts, but the judgments to which they refer are voluntary judgments given by the loser, and not judgments obtained by adverse action.(l)

Any game, whether of skill or chance, was within the acts.(m)

But both these acts are now repealed by the 8 & 9 Vict. c. 109, s. 15, except so much of the statute of Anne as was altered by the 5 & 6 Wm. 4, c. 41.

Money lent to play at any illegal game cannot be recovered back by the lender. "This principle," says Lord Abinger, "was not for the first time laid down in *Cannan v. Bryce*,(n) but by that case fully settled that the repayment of money lent for the express purpose of accomplishing an illegal object cannot be enforced."(o)

To discuss in detail the complicated provisions of the gaming acts, and the minute distinctions which arise on them, would be to wander from the main subject.

Horse-races, though legalized by 13 Geo. 2, c. 19, and 18 Geo. 2,

(g) *Antoine v. Morshead*, 6 Taunt. 237, E. C. L. R. vol. 1; 1 Marsh. 558, E. C. L. R. vol. 4, S. C.

(h) See *Bentinck v. Connop*, 5 Q. B. Rep. 693, E. C. L. R. vol. 48.

(i) See also 12 Geo. 2, c. 28, and 18 Geo. 2, c. 34.

(k) Sect. 5; see *Daintree v. Hutchinson*, 10 M. & W. 85; * *Applegarth v. Colley*, 10 M. & W. 723.*

(l) *Lane v. Chapman*, 11 Ad. & E. 966, E. C. L. R. vol. 39; 3 P. & D. 668; S. C. affirmed in error, *Ibid.* 980.

(m) *Sigell v. Jebb*, 3 Stark. 1, E. C. L. R. vol. 3.

(n) *Cannan v. Bryce*, 3 B. & Ald. 179, E. C. L. R. vol. 5.

(o) *McKinnell v. Robinson*, 3 Mees. & W. 434.

[*107] c. 34, were within the former acts against gaming.(p) *But a bet under 10*l.*, on a legal horse-race, was valid;(q) though a bill or note given to secure it would have been void.(r) But if the horse-race be for a sum less than 50*l.*,(s) or above 50*l.*, but not a contest between horses running on the turf, the bet was void.(t)

A bill of exchange or note given for a gaming debt was, until recently, void, even in the hands of an innocent indorsee for value, as against the party losing at play; but as against other parties it was and still is, valid. Thus, if a bill were accepted, or a note made, for a gaming debt, no party could charge the acceptor or maker;(u) but the drawer and indorser were and are nevertheless liable.(v)

The same rule of law applies to bills or notes given for the ransom of captured ships or cargoes;(w) to bills or notes given by a bankrupt to his creditor to induce him to sign the bankrupt's certificate.(x) In all these cases, as well as in the case of usury, the acts of Parliament avoiding bills or notes, so far as they make the instruments absolutely void, are repealed by the 5 & 6 Wm. 4, c. 41, s. 1.(y) This statute enacts, that bills or notes which would otherwise have been void, shall only be taken to have been given for an illegal consideration.(z) The effect of the enactment is conceived to be, that they are good in the hands of an innocent indorsee for value against all parties.

(p) *Goodburn v. Marley*, 2 Stra. 1159; *Clayton v. Jennings*, 2 Bla. 706; *Blaxton v. Pye*, 2 Wils. 309; *Shillito v. Theed*, 7 Bing. 405, E. C. L. R. vol. 20; 5 M. & P. 303, S. C.

(q) *McAllester v. Haden*, 2 Camp. 438.

(r) 9 Anne, c. 14, s. 1.

(s) *Johnson v. Bann*, 4 T. R. 1.

(t) *Ximenes v. Jacques*, 6 T. R. 499; *Whaley v. Pajot*, 2 B. & P. 51; see now 3 & 4 Vict. c. 5, which repeals 13 Geo. 2, c. 19, and 8 & 9 Vict. c. 109.

(u) *Bowyer v. Bampton*, 2 Stra. 1155; *Shillito v. Theed*, 7 Bing. 405, E. C. L. R. vol. 20; 5 M. & P. 303, S. C.

(v) *Ibid.*; *Edwards v. Dick*, 4 B. & Ald. 212, E. C. L. R. vol. 6.

(w) 45 Geo. 3, c. 72, s. 17.

(x) 6 Geo. 4, c. 16, s. 125.

(y) This statute is preserved in force by 8 & 9 Vict. c. 109, s. 15, the effect of which seems to be, that a winner of stakes may recover, though a promissory note for the amount would be void. *Baily v. Marriott*, 17 L. J. 215, C. P.; 5 C. B. 818, E. C. L. R. vol. 57, S. C.

(z) As to the effect of this enactment, see *Edmunds v. Groves*, 2 M. & W. 642.* Both sections of the statute are prospective. *Hitchcock v. Way*, 2 N. & P. 72; 6 Ad. & Ell. 943, E. C. L. R. vol. 33, S. C.; *Humphreys v. Earl of Waldegrave*, 6 M. & W. 622.*

The second section of this statute enacts, that if a loser at play gives a negotiable instrument, void under the acts against gaming, and pays the transferee, he may recover back the money so paid from the person to whom he originally gave the bill or note.

Under the old law, a renewed security was good, if given to an innocent indorsee before the bill fell due.(a)

*3. Stock-jobbing. The Stock-jobbing Act is the 7 Geo. 2, [*108] c. 8, made perpetual by 10 Geo. 2, c. 8. The principal provisions of this statute are as follow:(b)

1. Betting upon stock is prohibited; that is, a contract to pay or receive a certain sum of money for the liberty to deliver or not to deliver, or to accept or refuse a certain quantity of stock at a fixed price on a given day. Such a contract is declared void, the money paid is made recoverable, and both parties are subject to the penalty of 500*l.*, unless the money paid has been recovered or refunded.

2. The payment of money, instead of delivering or receiving stock, subjects to the penalty of 100*l.*

3. Contracts to buy or sell stock, of which the seller is not at the time possessed, subjects both parties to the penalty of 500*l.*(c)

It was formerly held, that money expended by another person in settling a stock-jobber's differences for him, or money lent him to settle them with, could be recovered.(d) But it is now settled, that as the fifth section of the act prohibits expressly the payment of money for the arrangement of differences, a person paying differences for another, or lending him money to pay them himself, advances money for an illegal purpose, and cannot recover it back.(e)

The following cases relating to bills have been decided on this statute :—The defendant employed a broker(f) to pay differences for

(a) *George v. Stanley*, 4 Taunt. 683.

(b) Transactions in foreign stock are not within this statute. *Henderson v. Bise*, 3 Stark. 158, E. C. L. R. vol. 3; *Wells v. Porter*, 2 Bing. N. C. 723, E. C. L. R. vol. 29; *Oakely v. Rigby*, 2 Bing. N. C. 732, E. C. L. R. vol. 29.

(c) But see *Mortimer v. M'Callan*, 7 M. & W. 20; * affirmed 9 M. & W. 636.*

(d) *Faikney v. Reynous*, 4 Burr. 2069; *Petrie v. Hannay*, 3 T. R. 418.

(e) *Cannan v. Bryce*, 3 B. & Ald. 179, E. C. L. R. vol. 5; *M'Kinnell v. Robinson*, 3 M. & W. 434.*

(f) Stock-brokers are within the statutes 6 Anne, c. 16, s. 4, and 57 Geo. 3, c. 40; *Clarke v. Powell*, 4 B. & Ad. 846, E. C. L. R. vol. 28; 1 N. & M. 492, S. C.; by which brokers are prohibited under a penalty from acting in London without admission by the mayor and aldermen. For the condition of the bond given by brokers, and the oaths taken by them, see *Kemble v. Atkins*, Holt, N. P. C. 427.

him, and after they were settled a dispute arose between them as to the amount of the money so paid by the broker. The case was referred to the plaintiff and three other arbitrators, who awarded the sum of 306*l.* 12*s.* 6*d.* to be due from the defendant to his broker. The broker then drew on the defendant for 100*l.*, part of this sum, the defendant accepted the bill, and the broker indorsed it to the plaintiff. It was held that the bill was void as between the broker and the defendant, and the plaintiff, having been an arbitrator, had notice of the illegal consideration, and stood in the same situation as

[*109] *the broker.(*g*) Where a broker had settled differences for his principal in omnium, had taken his principal's acceptance for the amount, and indorsed the bill when overdue, it was held, first, that jobbing in omnium was within the act; secondly, that the bill was void in the hands of the broker; and, thirdly, that having been indorsed when overdue, it was also void in the hands of the indorser, as against the acceptor.(*h*) A stock-jobber gave his broker a promissory note for differences paid for him by his broker, and the broker indorsed it overdue to the plaintiffs. The plaintiffs threatened to sue the defendants upon the note, but they consented to give the note, and take the defendant's bond instead, knowing at the time they took the bond, that the note had been given on an illegal consideration. Held, that they could not originally have recovered upon the note, nor afterwards upon the bond.(*i*) Where a man gave his acceptance for differences owing from himself to the drawer, and the drawer indorsed the bill for value without notice, it was held that the indorsee might recover against the drawer.(*k*) And as the statute does not expressly avoid securities given for differences, it should seem, the indorsee might have recovered against the acceptor.(*l*) Where a man sells stock of which he is not possessed, and afterwards buys it and transfers it to the vendee, he may, notwithstanding the statute, maintain an action for the price.(*m*)

(*g*) *Steers v. Lashley*, 6 T. R. 61; 1 Esp. 166, S. C.

(*h*) *Brown v. Turner*, 7 T. R. 630; 3 Esp. 631, S. C.

(*i*) *Amory v. Meryweather*, 2 B. & C. 573, E. C. L. R. vol. 9; 4 D. & R. 86, S. C.

(*k*) *Day v. Stuart*, 6 Bing. 109, E. C. L. R. vol. 19; 3 M. & P. 334, S. C.

(*l*) See Mr. J. Holroyd's observations in *Broughton v. Manchester Water Works Company*, 3 B. & Ald. 10, E. C. L. R. vol. 5. But may not stock-jobbing be within 9 Anne, c. 14?

(*m*) *Mortimer v. McCallan*, 7 M. & W. 20; * affirmed 9 M. & W. 636.*

Besides the cases which have been mentioned, there are many other instances of securities expressly avoided by the legislature; as, gaming policies on ships or lives; (*n*) sale of an office; (*o*) a stipulation with a sheriff for ease or favor; (*p*) a security whereby a creditor of a bankrupt who has proved his debt is to receive more than others; (*q*) or to receive anything for signing a bankrupt's certificate; (*r*) a security given by a man for a debt from which he has been discharged by the Insolvent Debtors' Act. (*s*) And to these the same *general rules apply as to securities given for a gaming debt, before [*110] the statute 5 & 6 Wm. 4, c. 41.

Many cases there are, also, in which, though the transaction is prohibited by the legislature, the security is not expressly avoided. In such instances, the bill is void in the hands of the parties to the illegal transaction, or cognizant thereof, but not in the hands of a bona fide indorsee for value, before the bill is due, without notice of the illegality. (*t*) The 24 Geo. 2, c. 40, prohibits persons from recovering a debt incurred by sale of spirituous liquors in less quantities than of the value of 20*s.*; and, where part of the consideration for a bill was spirituous liquors, within the statute, and part for money lent, it was holden wholly void in the hands of the payee. (*u*) But, where the defendant was indebted to the plaintiff for boarding and lodging, and for spirituous liquors in quantities of less value than 20*s.*, and having made the plaintiff several unappropriated payments, gave a promissory note for the balance, it was held that the plaintiff might appropriate these payments to the discharge of his demands for spirituous liquors, and that the consideration of the note being thus purged of those items, the plaintiff might recover on the note. (*v*)

(*n*) 19 Geo. 2, c. 37; 14 Geo. 3, c. 48.

(*o*) 5 & 6 Ed. 6, c. 16; 49 Geo. 3, c. 126; 53 Geo. 3, c. 129.

(*p*) 23 Hen. 6, c. 9.

(*q*) 5 Geo. 4, c. 16, s. 8; *Rose v. Main*, 1 Bing. N. C. 357, E. C. L. R. vol. 27; 1 Scott, 127, S. C.

(*r*) 6 Geo. 4, c. 16, s. 125; *Hankey v. Cobb*, 1 Q. B. Rep. 490, E. C. L. R. vol. 41.

(*s*) *Evans v. Williams*, 1 C. & M. 30; * 3 Tyrw. 226, S. C.; *Ashley v. Killick*, 5 M. & W. 509.*

(*t*) *Wyat v. Bulmer*, 2 Esp. 538.

(*u*) *Scott v. Gillmore*, 3 Taunt. 226; *Crookshanks v. Rose*, 1 M. & Rob. 100; 5 C. & P. 19, E. C. L. R. vol. 24, S. C. Where two sorts of spirits had been supplied at one time, the amount of each sort being under 20*s.*, but of both together above 20*s.*, it was held that the value of both was recoverable. *Owens v. Porter*, 4 C. & P. 367, E. C. L. R. vol. 19.

(*v*) *Crookshanks v. Rose*, 1 M. & Rob. 100; 5 C. & P. 19, E. C. L. R. vol. 24, S. C.

So a bill of exchange accepted to secure payment of money taken at the doors of an unlicensed theatre, is void(*w*) in the hands of the payee, who knew the theatre to be unlicensed. Therefore, also, as the statute 57 Geo. 3, c. 99, prohibits spiritual persons from trading, it was held, that a joint-stock banking company, in which a beneficed clergyman held shares, could not sue as indorsee on a bill of exchange.(*x*) In consequence of this decision, an act of Parliament, 1 Vict. c. 10, was passed to avoid the inconvenience.

But a note given for the amount of an attorney's bill not delivered pursuant to 6 & 7 Vict. c. 73, is good.(*y*)

It is no defence that the plaintiff being a transferee of a bill or note had notice of a fraudulent or illegal consideration, if he can deduce title from a prior party not shown to have had any such notice.(*z*)

[*111] *A judgment recovered by default will not be set aside, on the ground of illegality in the consideration, unless the defendant can affect the plaintiff with knowledge of that fact: but the Court has permitted him to try that in an issue.(*a*)

If part of the consideration of a bill or note be fraudulent or illegal, the instrument is vitiated altogether.(*b*) Where parties have woven a web of fraud or wrong, it is said to be no part of the duty of Courts of justice to unravel the threads.(1)

If a bill originally given upon an illegal consideration be renewed, the renewed bill is also void,(*c*) unless the amount be reduced by excluding so much of the consideration for the original bill as was illegal.(*d*)

(*w*) *De Begnis v. Armistead*, 10 Bing. 107, E. C. L. R. vol. 25; 3 M. & P. 511, S. C.

(*x*) *Hall v. Franklin*, 3 M. & W. 259; * 1 Hor. & W. 8, S. C.

(*y*) *Jeffreys v. Evans*, 14 M. & W. 210.*

(*z*) *Masters v. Ibberson*, 18 L. J. 348, C. P.

(*a*) *George v. Stanley*, 4 Taunt. 683; *Davison v. Franklin*, 1 B. & Ad. 142, E. C. L. R. vol. 20.

(*b*) *Robinson v. Bland*, 2 Burr. 1077; *Scott v. Gilmore*, 3 Taunt. 226; *Crookshanks v. Rose*, 5 Car. & P. 19, E. C. L. R. vol. 24; 1 M. & Rob. 100, S. C.; *Story on Promissory Notes*, s. 190.

(*c*) *Chapman v. Black*, 2 B. & Ald. 588; *Wynne v. Callander*, 1 Russ. 293; *Preston v. Jackson*, 2 Stark. 237, E. C. L. R. vol. 3.

(*d*) *Ibid.*; and see *Hubner v. Richardson*, Bayley, 6th ed. 527.

(1) *Carleton v. Bailey*, 7 Foster, 230.

*CHAPTER XI.

[*112]

OF THE TRANSFER OF BILLS AND NOTES.

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IN examining the subject of the transfer of bills and notes, let us consider, first, what bills are transferable; secondly, *the modes of transfer; thirdly, the nature and extent of an indorser's [*113] liability; fourthly, the rights of an indorsee; fifthly, the liability of

a person transferring by delivery; sixthly, the rights of a transferee by delivery; seventhly, transfer under peculiar circumstances; eighthly, and lastly, when a Court of Equity will restrain a transfer.

First, as to what bills are transferable.(a) We have already seen that a bill or note which does not contain a direction or promise to pay to *the order* of the payee, or *to bearer*, is not transferable; that is, not so as to charge the drawer or acceptor by an assignment of the right of action.

But if, nevertheless, the payee does indorse a *bill* not negotiable, he is liable on his indorsement to his indorsee.(b) For every indorser of a *bill* is in the nature of a new drawer.(c) If the bill, however, were not originally negotiable, it seems to have been considered by the Court of Common Pleas, that the first drawing exhausts the stamp, and that the indorsee cannot acquire a right, without a new stamp,(d) which cannot by law be imposed. If the declaration on a bill indorsed in blank, but not originally negotiable, or not indorsed by the payee, state that the defendant the indorser drew and indorsed the bill, payable to his order, it will upon evidence be open to the double objection, that the same act is treated both as a drawing and an indorsement, which it cannot be, and that the bill is described as made payable to order, whereas the effect of the blank indorsement is to make it payable to bearer.(e)(1)

(a) See the observations on the Assignability of Bills, ante, p. 2.

(b) *Hill v. Lewis*, 1 Salk. 132; *Smallwood v. Vernon*, 1 Stra. 478; *Gwinnell v. Herbert*, 5 Ad. & E. 436, E. C. L. R. vol. 31; *Burmester v. Hogarth*, 11 M. & W. 97;* *Penny v. Innes*, 1 C. M. & R. 439;* 5 Tyr. 107, S. C. But see *Plimley v. Westley*, infra, where the Court seemed to think that the stamp laws might interpose an obstacle.

(c) See *Allen v. Walker*, 2 M. & W. 317;* 5 Dowl. 460.

(d) *Plimley v. Westley*, 2 Bing. N. C. 249, E. C. L. R. vol. 29; 2 Scott, 423; 1 Hodges, 324, S. C., which however was the case of a note.

(e) *Burmester v. Hogarth*, 11 M. & W. 97.*

(1) The indorsee of a note in its terms not negotiable, may sue the indorser in his own name. *Leidy v. Tammany*, 9 Watts, 353.

The indorser of paper not negotiable is only responsible where he specially contracts to be so, or where he transfers the paper fraudulently; and in the latter case, not upon the indorsement, but by special action for the consideration paid by the indorsee. *Kirkpatrick v. McCullough*, 3 Humph. 171.

The indorser of a note not negotiable has no right in an action against him to insist upon previous demand and notice; his indorsement is equivalent to a guaranty. *Seymour v. Van Slyck*, 8 Wend. 403.

But the indorsement of a note (whether originally negotiable or not), by one to whom it has not been transferred, will not make the indorser liable on his indorsement.(f) For though every indorser of a bill may be treated, without inconvenience, as a new drawer or maker (for in that character he still requires notice of dishonor), yet an indorser of a note cannot be treated as a drawer or maker of the note, without altering his *situation for the worse, and depriving him of the right to notice of dishonor. [*114]

The words *or to his order* or *to bearer*, if omitted by mistake, may be afterwards inserted, without vitiating the instrument either at common law or under the Stamp Act.(g)

Whether a bill or note be negotiable or not is a question of law.(h)

Secondly, as to the modes of transfer. We have observed, that a bill or note, if payable to order, is not transferable, except by indorsement; but that, if payable to bearer, it is transferable by mere delivery.(i)

If a bill be made payable to A., or order, for the use of B., B.

(f) *Gwinnell v. Herbert*, 5 A. & E. 436, E. C. L. R. vol. 31; 6 N. & M. 723, S. C.; but see *Story on Promissory Notes*, s. 138.

(g) *Kershaw v. Cox*, 3 Esp. 246. See the Chapter on *Alteration*.

(h) *Grant v. Vaughan*, 3 Burr. 1516.

(i) It is conceived, that if an agent, a banker, for example, hold a bill transferable by delivery, a direction given to him by the owner to hold it for another, is a sufficient transfer by delivery. And that if the owner make over a bill transferable by delivery, *by deed*, and perhaps by any valid written or verbal contract, without actually delivering the bill, the deed amounts to delivery, in law, and the transferer holds it as agent of the transferee.

The indorser of a note not negotiable is liable to his indorsee in the same manner as in case of a negotiable note. *Jones v. Fales*, 4 Mass. 245; *Sanger v. Stimpson*, 8 *Ibid.* 260.

Every indorsement of a bill may be regarded as a new bill, drawn by the indorser on the acceptor in favor of the indorsee; and the indorsee may sue the acceptor, though the bill be not payable to order, and even though no payee is mentioned in the bill. *Van Staphorst v. Pearce*, 4 Mass. 258.

The indorser of a promissory note not negotiable, is not an original promisor, nor does he engage that the maker shall pay the note at all events. *Huntington v. Harvey*, 4 Conn. 124.

The statute 3 & 4 Anne, ch. 9, distinguishes between the *indorsement* and *assignment* of a negotiable note, and authorizes the holder by either mode of transfer to bring suit in his own name against the maker or indorser. An assignment of a promissory note transfers to the holder the rights of the assignor; the assignor being responsible for nothing more than the genuineness of the claim. *Lyons v. Dioelbis*, 22 Penna. State Rep. 185.

has but an equitable title, and the right of transfer is in A. alone.(j)(1)

Indorsements are of two sorts: an indorsement *in blank*, or, as it is sometimes termed, a *blank* indorsement, and an indorsement *in full*, or a *special* indorsement.(k) No particular form of words is essential to any indorsement. A *blank* indorsement is made by the mere signature of the indorser on the back of the bill; its effect is to make the instrument thereafter payable to bearer.(l)

"An indorsement in blank," says Lord Ellenborough, "conveys a joint right of action to as many as agree in suing on the bill."(m) Therefore, where three persons separately indorsed a bill for the accommodation of the drawer, which was afterwards dishonored and returned to them, and they paid the amount among them, it was held that they might bring a joint action against a previous indorser.(n) But where a bill of exchange was, by the direction of the payee, indorsed in blank, and delivered to A. B. and Co., who were bankers, on the account of the estate of an insolvent, which was vested in trus-

(j) *Evans v. Cramlington*, Carth. 5; *Cramlington v. Evans*, 2 Vent. 207; *Skin*. 264.

(k) The mark of a person who cannot write is a sufficient indorsement. *George v. Surrey*, 1 M. & M. 516.

(l) *Peacock v. Rhodes*, Doug. 611; *Francis v. Mott*, Doug. 612.

(m) *Ord v. Portal*, 3 Camp. 239.

(n) *Low v. Copestake*, 3 C. & P. 300, E. C. L. R. vol. 14.

(1) The contract *prima facie* implied from a blank indorsement of a negotiable promissory note by a third person, is that the note is due and payable according to its tenor; that the maker will be able to pay it at maturity; and that it is collectable by the use of due diligence. *Lafin v. Pomroy*, 11 Conn. 440; *Perkins v. Catlin*, *Ibid.* 213; *Walton v. Scott*, 4 *Ibid.* 527. Indorsement in blank of a note by one to whom it is not payable, as between the original parties, may be shown by parol to have been merely a collateral undertaking. *Barrows v. Lane*, 5 Vermont, 161.

Where a person, not the payee of a note on demand or on time, puts his name on the back at the time of its inception, he is liable as an original promisor or surety, but not as indorser. *Baker v. Briggs*, 8 Pick. 122; *Sumner v. Gay*, 4 *Ibid.* 311; *Austin v. Boyd*, 24 *Ibid.* 64; *White v. Howland*, 9 Mass. 314; *Malbon v. Southard*, 36 Maine, 147. See also *Tenney v. Prince*, 4 Pick. 385; *Ulen v. Kittredge*, 7 Mass. 233; *Birchard v. Bartlet*, 14 Mass. 279; *Moies v. Bird*, 11 Mass. 436; *Baker v. Scott*, 5 Richardson, 305; *Lewis v. Harvey*, 18 Missouri, 17; *Perry v. Barsit*, *Ibid.* 140; *Fear v. Dunlap*, 1 G. Greene, 331; *Pierson v. Boyd*, 2 Duer, 33.

By the law merchant, bills and notes payable to order, can be transferred only by indorsement. *Hestone v. Williamson*, 2 Bibb. 83; *Hopkirk v. Page*, 2 Brock. 20; *Taylor v. Binney*, 7 Mass. 479; *Blakely v. Grant*, 6 *Ibid.* 386; *Russell v. Swan*, 16 *Ibid.* 314.

tees, *for the benefit of his creditors, Lord Ellenborough held, that A. and B., two of the members of this firm, and also [*115] trustees, could not, conjointly with another trustee, who was not a member of the firm, maintain an action against the indorser, without some evidence of the transfer of the bill to them, as trustees, by the firm, by delivery or otherwise.(o)

An indorsement *in full*, besides the signature of the indorser, expresses in whose favor the indorsement is made. Thus, an indorsement in full by A. B. is in this form; "Pay Mr. C. D., or order. A. B." The signature of the indorser being subscribed to the direction, its effect is to make the instrument payable to C. D., or his order only; and, accordingly, C. D. cannot transfer it otherwise than by indorsement. The omission of words, "or order," is not material in a special indorsement; for the indorsee takes it with all its incidents, and among the rest, with its negotiable quality, if it were originally made payable to order.(p)

If a bill be once indorsed in blank, though afterwards indorsed in full, it will still, as against the drawer, the payee, the acceptor, the blank indorser, and all indorsers before him, be payable to bearer;(q) though, as against the special indorser himself, title must be made through his indorsee.

It is not essential to the validity of these written transfers that they be on the back; they may be on the face of the bill.(r)

There is no legal limit to the number of indorsements, and if there be not room to write them all distinctly on the back of the bill, the supernumerary indorsement may be written on a slip of paper annexed to the bill, called in French an "*allonge*." The *allonge* is thenceforth part of the bill, and requires no additional stamp.

A misspelling will not necessarily avoid an indorsement.(s)

(o) *Machell v. Kinnear*, 1 Stark. 499, E. C. L. R. vol. 2.

(p) *Moore v. Manning*, Com. Rep. 311; *Acheson v. Fountain*, 1 Stra. 557; *Edie v. East India Company*, 2 Burr. 1216; 1 Bla. 295, S. C.; *Cunliffe v. Whitehead*, 3 Bing. N. C. 829, E. C. L. R. vol. 32; 5 Scott, 31; 6 Dowl. 63, S. C.; *Gay v. Lander*, 6 C. B. Rep. 336, E. C. L. R. vol. 60.

(q) *Smith v. Clark, Peake*, 225; *Walker v. M'Donald*, 2 Ex. Rep. 527; * 17 L. J. 377, Ex.

(r) *Yarborough v. Bank of England*, 16 East, 6.

(s) See *Leonard v. Wilson*, 2 C. & M. 589; * 4 Tyr. 415, S. C.

[*116] *If two persons, not partners, are payees of a bill or note, both must indorse.(t)(1)

The indorsee may convert a blank indorsement into a special one in his own favor, by superscribing the necessary words. C. having a bill payable to himself, or order, indorsed it in blank, leaving a vacant space above, and sent it to J. S., his friend, who got it accepted: but the money not being paid, C. brought an action against the acceptor, and it was objected that the action should have been brought by J. S. But, per Holt, C. J.: "J. S. had it in his power to act either as a servant or assignee. If he had filled up the blank space, making the bill payable to him, *as he might have done if he would*, that would have witnessed his election to receive it as indorsee."^(u) The indorsee may also convert the blank indorsement into a special one in favor of a stranger, by superscribing above the indorsement the words "Pay A. B. or order;" and, if he transfer the bill in that way instead of indorsing, he is not liable as an indorser.^{(v)(2)}

Neither indorsement nor acceptance^(w) are complete before delivery of the bill. Where A. specially indorsed certain bills to B., sealed them up in a parcel, and left them in charge with his servant,

(t) Carvick v. Vickery, 2 Doug. 653, u.; see ante, as to indorsements by ex-partners, and by co-executors.

(u) Clerk v. Pigot, 12 Mod. 193; 1 Salk. 126, S. C.

(v) Vincent v. Horlock, 1 Camp. 442.

(w) Cox v. Troy, 5 B. & Ald. 474, E. C. L. R. vol. 7; 1 D. & Ry. 38, S. C.

(1) See Snelling v. Boyd, 5 Monroe, 172.

(2) Where there are several blank indorsements, the holder may fill up the first one of them to himself, or may deduce his title through all of them. Cole v. Cushing, 8 Pick. 48; Emerson v. Cutts, 12 Mass. 78; Ellsworth v. Brewer, 11 Pick. 316.

The holder of a note filled up a blank indorsement, directing payment to be made to a particular person, merely for the purpose of collection, and the agent returned the note with the protest for non-payment to such holder. Held, that he might strike out the special indorsement, and make it payable to himself, so as to bring the action in his own name against the indorser. Bank of Utica v. Smith, 18 Johns. 230.

The holder of a promissory note indorsed in blank may fill it up with any contract consistent with the character of an indorsement. Mitchell v. Culver, 7 Cowen, 336; Riker v. Cosby, 2 Penn. 911; Kiersted v. Rogers, 6 Har. & Johns. 282; Hungerford v. Thomson, Kirby, 393; Rees v. Bank, 5 Rand. 326; Lovell v. Evertson, 11 Johns. 52; Hunter v. Hempstead, 1 Missouri, 67; Moies v. Bird, 11 Mass. 436; Tenney v. Prince, 4 Pick. 385; Nevins v. Degrand, 15 Mass. 436; Leich v. Hill, 4 Watts, 448; Clawson v. Gustin, 2 South. 821; Dollfus v. Frosch, 1 Denio, 367; Union Bank v. Carr, 2 Humph. 345; Hubbard v. Williamson, 4 Iredell, 266.

to be given to the postman, it was held that the special indorsement did not transfer the property in the bills till delivery, and that delivery to the servant was not sufficient, though it would have been otherwise had the delivery been made to the postman.(x)

Hence the word *indorse* in the declaration on a bill imports a delivery and transfer to the indorsee, so as to confer title. Therefore, under a traverse of the indorsement the defendant may show that the circumstances were such as that the indorsement did not effect a legal delivery of the bill to the indorsee,(y) whether the actual delivery were to a third person, or to the indorsee himself.(z)(1)

*Thirdly, as to the liability of an indorser. Every indorser of a bill is in the nature of a new drawer,(a) and is liable to [*117] every succeeding holder in default of acceptance or payment by the drawee.

But a man may indorse a bill without incurring personal responsibility, by expressing in his indorsement that it is made with this qualification, that he shall not be liable on default of acceptance or payment by the drawee. Such qualified indorsement will be made by annexing in French the words "*sans recours*," or in English, "*without recourse to me*," or any equivalent expression;(b) and this is the proper mode of indorsement by an agent.(2)

(x) *Rex v. Lambton*, 5 Price, 428; *Adams v. Jones*, 4 P. & D. 174; 12 Ad. & El. 455, E. C. L. R. vol. 40; *Brind v. Hampshire*, 1 M. & W. 369; * *Bailey on Bills*, 6th ed. 137.

(y) *Marston v. Allen*, 8 M. & W. 494; * *Adams v. Jones*, 12 Ad. & E. 455, E. C. L. R. vol. 40; see *Robinson v. Little*, 18 L. J. 29, Q. B.

(z) *Bell v. Lord Ingestre*, 19 L. J. 71, Q. B.; 12 Q. B. Rep. 317, E. C. L. R. vol. 40, S. C.

(a) *Penny v. Innes*, 1 C. M. & R. 441; * 5 Tyrw. 107, S. C.; see *Allen v. Walker*, 2 M. & W. 317; * 5 Dowl. 460; 1 M. & H. 44, S. C.; see ante, p. 113.

(b) The words "at his own risk as agent" have been held in America to exclude the personal responsibility of an indorsee. See *Rice v. Stearns*, 3 Mass. Rep. 225; *Mott v. Hicks*, 1 Cowen, 512.

(1) Where a note is transferable by indorsement only, the mental incapacity of the indorser will be a defence to the maker as against the indorsee. *Peaslee v. Robbins*, 3 Metcalf, 164.

(2) An indorsement "without recourse," or at the indorsee's "own risk," will not expose the indorser to any liability. *Rice v. Stearns*, 3 Mass. 225; *Upham v. Prince*, 12 Mass. 14; *Richardson v. Lincoln*, 5 Metcalf, 201.

The indorsee incurs no other obligations than those imposed by the law of the place where the indorsement is made, unless a special indorsement shall subject

And if there be a written or even a verbal agreement between the first indorser and his immediate indorsee, that the indorsee shall not sue the indorser, but the acceptor only, it has been held, that such an agreement would be a good defence on the part of the original indorser, against his immediate indorsee, suing in breach of the agreement.(c)

A party transferring a bill, may also (as we have just seen) decline personal responsibility, by converting an existing blank indorsement into a special one in favor of his transferee.(d)

A bill may be indorsed *conditionally*, so as to impose on the drawee, who afterwards accepts, a liability to pay the bill to the indorsee or his transferees in a particular event only. Where a bill was indorsed on such a condition by the payee, afterwards accepted, then passed through several hands, and was finally paid by the acceptor before the condition was satisfied, it was held that the acceptor was liable to pay the bill again to the payee.(e) But it seems that a bill cannot be indorsed with a condition that in a certain event the indorsee shall [*118] not retain the power of further indorsing over.(f) And *it is clear that parol evidence, or evidence of intention, cannot be allowed to engraft such a condition.(g)

An indorsement admits the signature and capacity of every prior party.(h)

(c) Pike v. Street, 1 M. & M. 226, E. C. L. R. vol. 22; 1 Dans. & L. 159, S. C.; and see Clark v. Pigott, 1 Salk. 126; 12 Mod. 192, S. C.; Goupy v. Harden, 7 Taunt. 159, E. C. L. R. vol. 2, and Soares v. Glyn, post; see Thompson v. Clubly, 1 M. & W. 212.*

(d) As to the liability of an indorser, after non-payment by the drawee, see post.

(e) Robertson v. Kensington, 4 Taunt. 30; Savage v. Aldren, 2 Stark. 232, E. C. L. R. vol. 3.

(f) Soares v. Glyn, 14 L. J. 313, Q. B.; 8 Q. B. Rep. 24, E. C. L. R. vol. 55, S. C.

(g) Soares v. Glyn, 14 L. J. 313, Q. B.; 8 Q. B. 24, E. C. L. R. vol. 55, S. C.

(h) Lambert v. Oakes, 1 Lord Raym. 443; 12 Mod. 244; Lambert v. Pack, 1 Salk. 127; Williams v. Seagrove, 2 Barnard. 82; Crichlow v. Parry, 2 Camp. 182; Free v. Hawkins, Holt, N. P. Rep. 550; but see East India Company v. Tritton, 3 B. & C. 280, E. C. L. R. vol. 10; 5 D. & R. 214, S. C.

him to the *lex loci* where the bill is drawn or made payable. Therefore the indorsee of a bill drawn in a French West Indian island on a house in Bordeaux, payable a certain number of days after sight, and transferred in New York, need not present it for payment after protest for non-acceptance, notwithstanding the provisions of the French Commercial Code make a presentment for payment at maturity also necessary. Aymar v. Sheldon, 12 Wendell, 439; Allen v. Merchants' Bank, 22 Wendell, 215.

The striking out an indorsement by mistake will not discharge the indorser,⁽ⁱ⁾ but the striking it out by design will. Where, in an action by a remote indorsee, several indorsements are stated in the declaration, though unnecessarily, they must all be proved,^(k) unless the defendant has, by his conduct, as, for example, by an application to the plaintiff for time, admitted them.^(l) But the plaintiff may omit to state in his declaration all the indorsements, after the first indorsement in blank, and aver that the first blank indorser indorsed immediately to himself. In this case, however, all the intervening indorsements must be struck out. Abbott, C. J., "All the indorsements must be proved or struck out, although not stated in the declaration. I remember Bayley, J., so ruling and striking them out himself on the trial;" and this need not be done before the trial,^(m) but may be done after the plaintiff has finished his case.⁽ⁿ⁾ So where the action is against an indorser, and there are several indorsements between the payee's indorsement, and the defendant's, the plaintiff may state in his declaration that the payee indorsed to the defendant.^(o) It was formerly, therefore, usual in an action on a bill where there were several indorsements, to insert two counts; one setting out the indorsements, to avoid the necessity of striking them out; the other omitting them, so as to prevent a nonsuit if they could not be proved. It seems doubtful whether the plaintiff can avail himself of the title of an indorser whose name he has struck out.^{(p)(1)}

(i) *Wilkinson v. Johnson*, 3 B. & C. 428, E. C. L. R. vol. 10; 5 D. & R. 403, S. C. Nor the striking out by mistake of the acceptance. *Raper v. Birkbeck*, 15 East, 17; *Novelli v. Rossi*, 2 B. & Ad. 757, E. C. L. R. vol. 22.

(k) *Waynam v. Bend*, 1 Camp. 175.

(l) *Bosanquet v. Anderson*, 6 Esp. 43; *Sidford v. Chambers*, 1 Stark. 326, E. C. L. R. vol. 2.

(m) *Cocks v. Barradale*, Chitty, 642, 9th ed.

(n) *Mayer v. Jadis*, 1 M. & R. 247, E. C. L. R. vol. 17.

(o) *Chaters v. Bell*, 4 Esp. 210; Selw. 9th ed. 360, S. C.

(p) *Davies v. Dodd*, 1 Wils. Exch. 110; 4 Price, 176, S. C.; and see *Bartlett v. Benson*, 15 L. J. 23, Exch.; 3 D. & L. 274; 14 M. & W. 733,* S. C.

(1) In an action by the holder of a note against an indorser, the plaintiff cannot be permitted to strike out the name of any indorser prior to the defendant. *Curry v. Bank of Mobile*, 8 Porter, 360.

When a bill is returned to the first indorser after protest, he may strike out his indorsement though it be in full, and maintain an action in his own name. *Dugan v. United States*, 3 Wheat. 183; *United States v. Barker*, Paine, 156; *Picquet v. Curtis*, 1 Sumner, 480.

A holder of a bill, with several indorsements in blank, may strike out all the in-

[*119] *Fourthly, as to the rights of an indorsee. A transfer by indorsement vests in the indorsee a right of action against all the parties whose names are on the bill, in case of default of acceptance or payment; and we have already seen, (q) that, against an innocent indorsee for value, no prior party can set up the defence of fraud, duress, or absence of consideration. But, if the payee of a bill payable to order, neglect to indorse, the holder has no remedy in his own name against any person but him from whom he received it. (1)

If a man have delivered a bill, without indorsing it, where it was intended that it should be indorsed, and afterwards refuses to indorse, an action may be maintained against him for refusing to indorse. (r) He, or his personal representatives, may also be compelled by bill in equity to indorse. (s)

If a bill be reindorsed to a previous indorser, he has, in general, no remedy against the intermediate parties, for they would have their remedy over against him, and the result of the actions would be, to place the parties in precisely the same situation as before any action at all. (t) But where a holder has previously indorsed, and the subsequent intermediate indorser has no right of action or remedy on that previous indorsement against the holder, there are cases in which the holder may sue the intermediate indorser. (u) And if the party declares, as he may do, on an indorsement from the first blank indorser to himself, it will, it seems, be intended that he means to rely

(q) Chapter on *Consideration*.

(r) *Rose v. Sims*, 1 B. & Ad. 521, E. C. L. R. vol. 20.

(s) *Watkins v. Maule*, 2 Jac. & Walker, 242; *Smith v. Pickery*, Peake, 50; *Rolleston v. Hibbert*, 3 T. R. 411; *Ex parte Rhodes*, 3 Mont. & Ayr. 217.

(t) *Bishop v. Hayward*, 4 T. R. 470; *Britten v. Webb*, 2 B. & C. 483, E. C. L. R. vol. 9; 3 D. & R. 650, E. C. L. R. vol. 16, S. C.

(u) *Wilders v. Stevens*, 15 L. J. 108, Exch.; 15 M. & W. 208,* S. C.; *Williams v. Clarke*, 16 M. & W. 834;* *Smith v. Marsack*, 18 L. J. 65, C. P.; *Morris v. Walker*, 19 L. J., Q. B. 400. And to reply the facts is no departure. *Ibid.*, and *Story on Promissory Notes*, s. 479.

dorsers' names after the first, and write over the first indorser's name an assignment to himself. *Ritchie v. Moore*, 5 Munford, 388; *Craig v. Brown*, Peters, C. C. Rep. 171; *Bell v. Morehead*, 3 Marsh. 158.

(1) The purchaser of a negotiable promissory note not indorsed by the payee, has only an equitable interest therein; and an action upon the same must be brought in the name of the payee. *Freeman v. Perry*, 22 Connecticut, 617.

on his first title, and it is doubtful whether he can reply any facts arising on the intervening indorsements without a departure.(v)(1)

But where a bill or note is merely indorsed to another, and deposited with him as a trustee, he can only use it in conformity with the stipulations on which he became the depositary of it.(w)

If the depositary of the bill indorse it over in breach of trust, *the indorsee, with notice of the breach of trust, can acquire [*120] no title to the bill as against the rightful owner, and can neither sue him on the bill, nor hold the bill against him.(x) Therefore, where the acceptor of a bill, who had received no value, delivered the bill to the drawer, desiring him to hold it for his use, but the drawer indorsed it for value to the defendant, who knew that the drawer had no authority to part with it, the defendant, the indorser, was held liable to the acceptor in trover. "The drawer," says Lord Tenterden, "having put the bill in the defendant's hands, when the defendant knew that the drawer had no authority so to do, the defendant's title is no better than the drawer's. But then, it is said, allowing that the plaintiff had a property in the bill, the defendant had a right to hold it, because he may sue the drawer. I think the defendant had no right to hold it as against the acceptor, the plaintiff, because the defendant took the bill with the knowledge that the person from whom he took it had no title to it as against the plaintiff."(y)

(v) *Bartlett v. Benson*, 15 L. J. 23, Exch.; 14 M. & W. 733,* S. C.

(w) As to the consideration where the bill is deposited as security for the balance of a running account, see ante, 96.

(x) *Goggerly v. Cuthbert*, 2 N. R. 170.

(y) *Evans v. Kymer*, 1 B. & Ad. 528, E. C. L. R. vol. 20.

(1) It is competent for an indorser of a note on again coming into possession of the note to maintain an action thereon, without producing extrinsic proof of ownership. *Earbee v. Wolf*, 9 Porter, 366. See *Welch v. Linds*, 7 Cranch, 159; *Dugan v. The U. S.*, 3 Wheaton, 172. "After an examination of the cases on this subject (which cannot all of them be reconciled) the court is of opinion, that if any person who indorses a bill of exchange to another, whether for value or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the bona fide holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsers, whose names he may strike from the bill or not, as he may think proper." *Ibid.* Per *Livingston, J.* See *Bond v. Storrs*, 13 Conn. 412.

So where the drawer of a bill of exchange deposited it with a creditor, and gave him authority to receive the proceeds and apply them in a specified way, and the drawer afterwards committed an act of bankruptcy, on which a commission issued, the creditor having, after the act of bankruptcy, delivered the original bill to the acceptor, and taken in lieu of it another bill, it was held by Tindal, C. J., that the creditor had been guilty of a conversion, and the assignees of the bankrupt might recover against him in trover.^(z) But it would have been otherwise, if the creditor had merely received the money, for that would not have amounted to a conversion.^(a) Where a bill has been indorsed in blank, and the transferee of the depositary takes it without knowledge of the particular and limited purpose for which the bill was deposited with the trustee, the transferee acquires a title;^(b) and the transferee's title will not now be affected by proving him guilty of negligence, however gross, if there were no fraud. Gross negligence may, however, be evidence of fraud.^(c) And it is conceived, that if the bill had not become payable to bearer, but was [*121] transferable only by indorsement of the trustee, an *indorsement by him in breach of trust to an indorsee for value, and without notice, would in general confer a title.

The trust may be expressed on the bill itself by a restrictive indorsement, or a restrictive direction appended to the payee's name, so that, into whose hands soever the bill may travel, it will carry a trust on the face of it.^(d)(1)

The following have been held to be restrictive directions or indorse-

(z) *Robson v. Rolls*, 1 M. & Rob. 239.

(a) *Jones v. Fort*, 9 B. & C. 764, E. C. L. R. vol. 17; 4 M. & Ry. 547, S. C.

(b) *Bolton v. Puller*, 1 B. & P. 539; *Ramsbottom v. Cator*, 1 Stark. 228, E. C. L. R. vol. 2; *Collins v. Martin*, 1 B. & P. 648; *Gorgier v. Mievill*, 3 B. & C. 45, E. C. L. R. vol. 10; 4 D. & R. 641, S. C.; *Wookey v. Pole*, 4 B. & Ald. 1, E. C. L. R. vol. 6; and see *Roberts v. Eden*, 1 B. & P. 398.

(c) *Goodman v. Harvey*, 4 Ad. & E. 870, E. C. L. R. vol. 31; 6 N. & M. 372, S. C.; *Uther v. Rich*, 10 Ad. & E. 784, E. C. L. R. vol. 37; 2 Per. & D. 579, S. C.

(d) Such restrictive indorsements are not of very late invention, but they appear to have been well known before the middle of the last century. *Snee v. Prescott*, 1 Atk. 247; *Edie v. East India Company*, 2 Bur. 1227; 1 Bla. R. 295, S. C.

(1) The payee of a note can restrain its negotiability, but a subsequent indorser can revive its negotiable quality. *Holmes v. Hooper*, 1 Bay, 160.

An indorsement, at the time of making a promissory note, rendering it payable on a contingency, does not affect its negotiability; it is notice of the consideration to a subsequent holder. *Tappan v. Ely*, 15 Wend. 362.

ments:—"The within must be credited to A. B.;"(e) "Pay to A. B. or order, for my use;" "Pay to A. B. for my account;" "Pay to A. B. only."

A holder who takes a bill, the circulation of which is restricted by a restrictive direction or indorsement, cannot sue the drawer or acceptor upon it, but holds the bill or the money raised by him as the trustee of the restraining party, and is liable to refund the bill or money received upon it to the party making the restrictive indorsement. For such words cannot be intended as a mere private direction to the immediate indorsee; for he is bound to account for the bill without any such direction; not to mention that the most obvious mode of conveying a private direction, would be either by oral communication, or by a letter enveloping the bill. Nor can they be a mere direction to the drawee; for a restrictive indorsement constitutes, not only the restricted indorsee, but his assignees, agents to receive the money, and for its misapplication, when so paid, the drawee is not responsible. As between the restraining indorser, therefore, and the immediate indorsee, or the drawee, the words "*to my use*," or the like, are of no effect. But as between the restraining indorser and a subsequent indorser, they are a notification that the restricted indorsee has no property in the bill, that he is a mere agent and trustee for his principal, and that he can appoint no sub-agent, except for the purpose of holding the bill or the money upon a similar trust. The subsequent indorsee, therefore, being himself also a mere agent, can have no action on the bill if it is dishonored, nor hold it, or the money received upon it, against the principal; and if, instead of paying the money to the principal, he chooses to pay it to the intermediate agent, he becomes responsible for its misapplication.

A bill was indorsed by the payee in this form:—"Pay A. B., or order, for the account of C. D.;" A. B. pledged it with the defendant, who advanced money upon it to A. B. personally. Held, that *the defendant had sufficient notice, from the indorsement, that A. B. had no authority to raise money on the bill for his own [*122] benefit, and, therefore, could not defend an action of trover for the bill, brought by C. D., his principal.(f)

A., a merchant at Boston, in New England, remitted a bill to B.,

(e) Ancher v. Bank of England, Doug. 615; Edie v. East India Company, 2 Bur. 1227; Evans v. Cramlington, Carthew, 5; Cramlington v. Evans, 2 Vent. 307, S. C.; Treuttel v. Barandon, 7 Taunt. 100; 1 Moore, 543, S. C.

(f) Treuttel v. Barandon, 8 Taunt. 100, E. C. L. R. vol. 4; 1 Moore, 543, S. C.

his agent, in London, indorsing it in this form:—"Pay B. or his order, for my use." B. discounted it with his bankers; he afterwards failed, and the bankers, to whom he was indebted in more than the amount of the bill, received payment of it at maturity from the acceptors. Held, in an action for money had and received, that the bankers were liable to refund the money to A.(g)

We have already seen, that the omission of the words "*or order*," in a special indorsement, will not restrain the negotiability of a bill.(h)

Fifthly. As to the liability of a person transferring by delivery.

A transfer by mere delivery, without indorsement, of a bill of exchange or promissory note made or become payable to bearer, does not render the transferer liable on the instrument to the transferee.

And it is conceived to be the general rule of the English(i) law, and the fair result of the English authorities, that the transferer is not even liable on the consideration, if the bill or note so transferred by delivery without indorsement, turn out to be of no value, by reason of the failure of the other parties to it. For the sending to market of a bill or note payable to bearer without indorsing it, is *prima facie* [*123] a sale of the bill. *And there is no implied guarantee of the solvency of the maker, or any other party.(k)

Such seems the general rule governing the transfer by delivery, not only of ordinary bills of exchange and promissory notes, but also of bank notes. Nor is there any hardship in such a rule, for the remedy against the transferer may always be preserved by indorse-

(g) *Sigourney v. Lloyd*, 8 B. & C. 622, E. C. L. R. vol. 15; affirmed in the Exchequer Chamber, 5 Bing. 515, E. C. L. R. vol. 15; 3 Y. & J. 220,* S. C.

(h) *Moore v. Manning*, Com. Rep. 311; *Acheson v. Fountain*, 1 Stra. 557; *Edie v. East India Company*, 2 Bur. 1216; 1 Bla. R. 295, S. C.

(i) In America also it has been repeatedly held, that payment in bank notes after the bank has failed is good, and the loss falls on the receiver. *Bayard v. Shunk*, 1 Watts & Serg. Rep. 92; *Young v. Adams*, 6 Mass. Rep. 182-185; *Scruggs v. Gass*, 8 Yerger, 175; *Lowry v. Murrell*, 2 Porter, 282. The contrary, however, has been also held. *Lightbody v. Ontario Bank*, 11 Wend. Rep. 1; affirmed on error in 13 Wend. Rep. 107; *Harley v. Thornton*, 2 Hill, 509; *Fogg v. Sawyer*, 9 New Hamp. Rep. 365; see *Story on Promissory Notes*, 125. It is conceived that the confusion has arisen from neglecting to distinguish between questions of law and questions of fact.

(k) See the observations of Littledale, J., in *Camidge v. Alienby*, 6 B. & C. 373, E. C. L. R. vol. 13, and *Rogers v. Langford*, 1 C. & M. 637.*

ment, or by special contract. The rule, however, is not without exceptions.

If a banker's note be given on account of a pre-existing debt, the note is not to be considered as sold. But if the banker fail, and if the note be duly presented, and due notice be given of the dishonor, the remedy for the antecedent debt revives. "I agree," says Holt, C. J., "the difference taken by my brother Darnell, that taking a note for goods sold is a payment, because it was a part of the original contract, but paper is no payment where there is a precedent debt. For when such a note is given in payment, it is always taken to be given under this condition to be payment, if the money be paid thereon in convenient time."^(l) The principle of the exception seems to be this. This creditor is entitled to cash; if instead of cash he consents to take notes, that is a favor to the debtor, and it will thence be inferred, in the absence of evidence to the contrary, that the notes were not to be payment, if they turn out of no value without the fault of the creditor.⁽¹⁾

But if a bill or note, made or become payable to bearer, be delivered without indorsement, not in payment of a pre-existing debt, but by way of exchange for goods, for other bills or notes, or for money transferred to the party delivering the bill, at the same time, such a transaction is held to be a sale of the bill by the party transferring it, and a purchase of the instrument, with all risks, by the transferee. "It is extremely clear," says Lord Kenyon, "that, if the holder of a bill send it to market without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he sold it, if he did not know at the time that it was not a good bill."^(m) So where A. gave a bankrupt, before his bankruptcy, cash for a bill, but refused to allow the bankrupt to indorse it, thinking it better without *his name, and afterwards, on dishonor of the bill, proved the amount under the commission, the [*124] Chancellor ordered the debt to be expunged, observing, that this was

(l) Ward v. Evans, 2 Ld. Raym. 928; Camidge v. Allenby, 6 B. & C. 373, E. C. L. R. vol. 13. So held also by Pratt, C. J., in Moore v. Warren, 1 Stra. 415; and by King, C. J., in Holme v. Barry, 1 Stra. 415.

(m) Fenn v. Harrison, 3 T. R. 759; and see Evans v. Whyte, 5 Bing. 485, E. C. L. R. vol. 15; 3 M. & P. 130, S. C.

(1) See post, 184, note.

a sale of the bill.(n) So, if a party discounts bills with a banker, and receives in part of the discount other bills, but not indorsed by the banker, which bills turn out to be bad, the banker is not liable. "Having taken them without indorsement," says Lord Kenyon, "he has taken the risk on himself. The bankers were the holders of the bills, and, by not indorsing them, have refused to pledge their credit to their validity; and the transferee must be taken to have received them on their own credit only."(o) So, where, in the morning, A. sold B. a quantity of corn, and, at three o'clock in the afternoon of the same day, B. delivered to A. in payment certain promissory notes of the Bank of C. which had then stopped payment, but which circumstance was not at the time known to either party, Bayley, J., said, "If the notes had been given to A. at the time when the corn was sold, he could have had no remedy upon them against B. A. might have insisted on payment in money, but, if he consented to receive the notes as money, they would have been taken by him at his peril."(p) In this case, an interval of a few hours in the same day between the purchase and the payment was held to convert the delivery of the notes into a payment of a pre-existing debt.

And it is conceived, that as an express contract would make the transferer liable without indorsement, so there are other circumstances from which a jury may infer that the intention, and *implied* contract of the parties was, that the notes were not to be payment, if dishonored.(q)

If, for example, a man asked another to change a bank note for him as a favor, and the banker fail, it is conceived that a jury would be justified in inferring an implied contract to refund the change, if the note were duly presented and dishonored, and due notice given.(r)

(n) *Ex parte Shuttleworth*, 3 Ves. 368.

(o) *Fyde v. Clark*, 1 Esp. 447; *Bank of England v. Newman*, 1 Ld. Raym. 442; 12 Mod. 241; Com. 57; *Emly v. Lye*, 15 East, 7. But in *Ex parte Blackburne*, 10 Ves. 204, the Chancellor seemed to think, that if goods are purchased and paid for at the time by bills not indorsed, the vendee is liable, if the bills turn out bad. See *Jones v. Ryde*, 5 Taunt. 488, E. C. L. R. vol. 1; 1 Marsh. 157, S. C.; *Owenson v. Morse*, 7 T. R. 64.

(p) *Camidge v. Allenby*, 6 B. & C. 373, E. C. L. R. vol. 13; 9 D. & R. 391, S. C.; see *Robson v. Oliver*, 10 Q. B. Rep. 704, E. C. L. R. vol. 59; and see *Ward v. Evans*, 2 Ld. Raym. 928, and *Rogers v. Langford*, 1 Crompt. & Mees. 637.*

(q) See *Van Wart v. Woolley*, 3 B. & C. 446, E. C. L. R. vol. 10, and post, Chap. xxii.

(r) See *Rogers v. Langford*, 1 C. & Mees. 637; * *Turner v. Stones*, 1 D. & Lowndes, 122; *Ex parte Isbester*, 1 Rose, 23.

*A transferer, by delivery, though he does not in general warrant the solvency of the maker of a promissory note or [*125] bill of exchange, does warrant that the bill or note is not forged or fictitious.(s)(1)

A transferer, by delivery, cannot be liable in any case to a subsequent transferee, either on the instrument or the consideration. And therefore it has been held, that such subsequent transferee cannot prove for the value in the event of the first transferer's bankruptcy.(t)

But, in all cases, if notes or bills are transferred as valid, when the transferer knows they are good for nothing, the suppression of the truth is a fraud, and he is liable. "If," continues Mr. Justice Bayley, in the case before referred to, "A. could show fraud or knowledge of the maker's insolvency, in the payer, then it would be wholly immaterial whether the notes were taken at the time of sale or afterwards."(u)

Sixthly, as to the rights of transferee by delivery. Bills or notes payable to bearer circulate as money, and are considered as such. And it is absolutely essential to the currency of money, that the property and possession should be inseparable. We have already seen that the indorsee of a bill payable to order, and not made payable to bearer by a blank indorsement, has no right to the bill, either so as to retain it against the real owner, or to sue any party upon it, unless the indorser had a right to indorse.(v) Whereas, if a check,

(s) *Jones v. Ryde*, 5 Taunt. 489, E. C. L. R. vol. 1; 1 Marsh. 157, E. C. L. R. vol. 4, S. C.; *Bruce v. Bruce*, 1 Marsh. 165, E. C. L. R. vol. 4; 5 Taunt. 495, E. C. L. R. vol. 1; *Fuller v. Smith, Ryan & M.* 49. So it has been repeatedly held in America. *Ellis v. Wild*, 6 Mass. Rep. 321; *Young v. Adams*, Ibid. 182; *Markle v. Hatfield*, 2 John. R. 455; *Eagle Bank of Newhaven v. Smith*, 5 Conn. R. 71. Mr. Justice Story lays it down that there is also a warranty of the title of the transferer. *Treatise on Promissory Notes*, p. 123. But it is conceived that that is not so. Indeed, an honest transferee by delivery needs no such warranty.

(t) *In re Burrington*, 2 Sch. & Lef. 112.

(u) *Camidge v. Allenby*, 6 B. & C. 373, E. C. L. R. vol. 13; 9 D. & R. 391, S. C.; *Fenn v. Harrison*, 3 T. R. 759.

(v) *Mead v. Young*, 4 T. R. 28.

(1) The doctrine of implied warranty in sales, applies to the sale of a note: so that one who sells an indorsed note gives an implied warranty that the indorsement is a genuine one. *Strange v. Ellison*, 2 Bailey, 385; *McNeil v. Knott*, 11 Georgia, 142.

bill, or note, be made or have become payable to bearer, the title of the holder, both as against a former owner on the one hand, and the maker, acceptor, or indorser on the other, is not affected by any infirmity in the title of the transferer, provided the holder took it bona fide.(1)

It was formerly considered that the transferee's title would be affected by want of due caution on his part, and that he ^[*126]would be liable in trover to the real owner, and unable to enforce payment against the parties to the instrument, if he were guilty of negligence in taking it. Thus, where a banker, in a small market town, changed a 500*l.* Bank of England note for a stranger, without any further inquiry than merely asking his name, he was held liable, in trover, to a party from whom the note had been unlawfully obtained; Best, C. J., observing, "The party's caution should increase with the amount of the note which he is called upon to change.(w) A man may change a 20*l.* note without asking a single question, but would that be right as to one of several thousands? More caution is required in the case of a discounteer than of a payer."(x)

But it is now definitively settled, that if a man takes *honestly* an instrument made or become payable to bearer, he has a good title to it, with whatever degree of negligence he may have acted, unless his gross negligence induce the jury to find fraud. "I believe," says Lord Denman, "we are all of opinion that gross negligence only would not be a sufficient answer by the defendant where the plaintiff has given consideration for the bill. Gross negligence may be evidence of mala fides, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine."(y)

(w) *Snow v. Peacock*, 2 C. & P. 221, E. C. L. R. vol. 12; and see *Gill v. Cubitt*, 3 B. & C. 466, E. C. L. R. vol. 10; 5 D. & R. 324, S. C.; *Egan v. Thretfall*, 5 D. & R. 326, E. C. L. R. vol. 16.

(x) Perhaps this last proposition may now be reversed.

(y) *Goodman v. Harvey*, 4 Ad. & El. 870, E. C. L. R. vol. 31; 6 N. & M. 372, S. C.; *Uther v. Rich*, 10 Ad. & E. 784, E. C. L. R. vol. 37; 2 P. & D. 579, S. C. In the case of *Goodman v. Harvey*, the bill bore on it when discounted, the notarial mark of non-acceptance. To use the words of the Lord Chief Justice, "the plain-

(1) A note payable to A. or bearer, may be negotiated by delivery only, even if indorsed by A. *Wilbour v. Turner*, 5 Pick. 526; *Dole v. Weeks*, 4 Mass. 451.

A note or bill with a seal to it is not a negotiable instrument; but in Georgia it has been held that a bond payable to bearer is. *Porter v. McCollum*, 15 Georgia, 529.

If the party presenting a bill or note payable to bearer, be the mere agent of another, the agent's title is infected with the infirmity of his principal's title, although the principal is in the agent's debt; and the agent consequently cannot enforce payment of the maker.(z)

It makes no difference that the bill or note is only pledged, and not absolutely transferred; the pawnee acquires a property in it, and is not liable in trover, to the real owner, as in the case of goods improperly pledged.(a)

*Exchequer bills, which are payable to bearer before the blank is filled up,(b) bonds of foreign princes and states payable to bearer,(c) and East India bonds,(d) resemble money and bills of exchange payable to bearer, in the necessary union of possession and property. Honest acquisition confers title.(e)

A metallic token like an I. O. U., should seem at common law to be only evidence of a debt. Though intended for circulation, it can therefore at common law give no right of action to a transferee.

But the issuer of tokens made of mixed metals, compounded partly of gold or silver, is liable to the holder.(f)

The issuer of a token made wholly or in part of copper, is liable only to the original taker.(g)

tiff received the bill with a death-wound apparent on it." See *Backhouse v. Harrison*, 5 B. & Ad. 1098, E. C. L. R. vol. 27; 3 N. & M. 188; *Crook v. Jadis*, 5 B. & Ad. 909, E. C. L. R. vol. 27; 3 N. & M. 257, S. C.; *Foster v. Pearson*, 1 C. M. & R. 855; * 5 Tyr. 255, S. C.; *Willis v. Bank of England*, 4 Ad. & E. 21, E. C. L. R. vol. 31.

(z) *Solomons v. Bank of England*, 13 East, 135; 1 Rose, 99, S. C.

(a) *Collins v. Martin*, 1 Bos. & Pul. 648; 2 Esp. 520, S. C. See as to lien of banker, post.

(b) *Wookey v. Poole*, 4 B. & Ald. 1, E. C. L. R. vol. 6; see as to divided warrants, *Partridge v. Bank of England*, 13 L. J. 281, Q. B., and 9 Q. B. 424, E. C. L. R. vol. 58, in error; and see further as to Exchequer bills, *Barnett v. Brandao*, 6 M. & G. 630, E. C. L. R. vol. 46; *Brandao v. Barnett*, 3 C. B. Rep. 519, E. C. L. R. vol. 54.

(c) *Gorgier v. Meiville*, 3 B. & C. 45, E. C. L. R. vol. 10; 5 D. & R. 641, S. C.

(d) 51 Geo. 3, c. 64.

(e) The embezzling of bills by agents, or pledging them beyond their lien, is a transportable misdemeanor; 7 & 8 Geo. 4, c. 29, ss. 49 and 50. As to *Lost Bills*, see the chapter on that subject.

(f) 53 Geo. 3, c. 114, s. 3.

(g) 57 Geo. 3, c. 46.

The issuing of tokens made partly of gold or silver is restrained by the 53 Geo. 3, c. 114, and the issuing of tokens made wholly or partly of copper by the 57 Geo. 3, c. 46.

Tokens into the composition of which neither the precious metals or copper enter, seem left to the common law.

Wages, however, cannot in certain trades be paid in tokens.(h)

Seventhly, as to transfer under peculiar circumstances.

An indorsement may be made even before the bill or note itself, and so render the indorser liable to subsequent parties to any amount warranted by the stamp. The plaintiffs were bankers, with whom one G. had dealings. They refused to let him have more money, unless he procured them the indorsement of a third person. G. accordingly induced the defendant to sign his name across the back of four blank forms of promissory notes. G. then filled them up, and delivered them to the plaintiffs, who knew the notes were blank at the time of the indorsement. The notes were not paid by G., the maker, and the plaintiffs called on the defendant as indorser. Lord Mansfield: "Nothing is so clear, as that the indorsement on a blank note is a [*128] letter of credit for an indefinite sum. *The defendant said, 'Trust G. to any amount, and I will be his security.' It does not lie in his mouth to say the indorsements were not regular." (i)(1)

An indorsement may be made either before or after acceptance. If a bill be indorsed after refusal to accept, and notice thereof to the indorsee, or after it is due, these are circumstances which may reasonably excite suspicion as to the liability or solvency of the antecedent parties. An indorsee, therefore, of a bill dishonored or after due, with notice thereof, has not all the equity of an indorsee for value in the ordinary course of negotiation. He is held to take the bill on

(h) 1 & 2 Wm. 4, c. 37.

(i) Russell v. Langstaffe, Doug. 496; Usher v. Dauncy, 4 Camp. 97. A bill may be indorsed before the day of its date. Passmore v. North, 13 East, 517; and see Snaith v. Mingay, 1 M. & Sel. 86; Cruchley v. Clarence, 2 M. & Sel. 90; and see 17 Geo. 3, c. 30, s. 1, and Schultz v. Astley, 2 Bing. N. C. 544, E. C. L. R. vol. 29; 2 Scott, 815; 1 Hodges, 525, S. C.

(1) A blank indorsement, upon a blank piece of paper, with intent to give a person credit, is in effect a letter of credit; and if a promissory note is afterwards written on the paper, the indorser cannot object that the note was written after the indorsement. Violet v. Patton, 6 Cranch, 142.

the credit of his indorser, and has no superior title against the other parties.(k)

Drawer requested defendant to indorse two bills, for his, the drawer's, accommodation. He accordingly drew two in favor of the defendant, which defendant indorsed, and gave up to him. These bills the drawee then gave to A., and A. signed an agreement with defendant, that if one of the bills were paid, the defendant should be exonerated from the other. One of them the defendant accordingly did pay. The other was presented for acceptance and dishonored; it was, after this, indorsed by A. to the plaintiffs, with notice of the dishonor. On payment being refused, plaintiffs sued defendant. Held, that the plaintiffs, having taken the bill after notice of dishonor, took the title of their indorser, and that, as the agreement would have been a defence to an action at the suit of A., it was a defence also against the plaintiffs.(l)

But if the indorsee had no notice of the dishonor, he is not prejudiced by it. Payee presented a bill for acceptance, which was refused. He neglected to advise the drawer, and thereby discharged the drawer as between the drawer and himself. He then indorsed the bill without informing his indorsee of the dishonor. Held, that the discharge to the drawer extended only to an action at the suit of the party guilty of the neglect, and that the indorsee having had no notice of the dishonor, the same defence was not available against him as against his indorser.(m)

*“After a bill or note is due,”(n) says Lord Ellenborough, “it comes disgraced to the indorsee, and it is his duty to make [*129] inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the indorser, and subject

(k) But as to a bill payable to bearer, see *Goodman v. Harvey*, 4 Ad. & El. 870, E. C. L. R. vol. 31; 6 N. & Man. 372, S. C.

(l) *Crossley v. Ham*, 13 East, 498.

(m) *O’Keefe v. Dunn*, 6 Taunt. 305, E. C. L. R. vol. 1; 1 Marsh. 613, E. C. L. R. vol. 4, S. C.; affirmed in the K. B.; 5 M. & S. 282; and see *Whitehead v. Walker*, 11 L. J. 168, Exch.; 9 Mees. & Wels. 506,* S. C., and *Bartlett v. Benson*, 14 M. & W. 733,* 3 D. & L. 274; 15 L. J., Ex. 23, S. C.

(n) It is apprehended that wherever a party alleges that a bill was indorsed when overdue, or under any other peculiar circumstances, it lies on the party averring the fact to prove it on the general principle, “*Ei incumbit probatio qui dicit.*” See post, p. 132.

to all the(o) equities with which it may be incumbered." Thus, where the defendant made a promissory note for the accommodation of the payee, and the payee indorsed it, overdue to A., and A. indorsed it to the plaintiff, it was formerly held that, as the absence of consideration would have been a good defence against the payee, it was also available both against A. and the plaintiff.(p)(1)

It is now, however, clear that an original absence of consideration, such as arises in the case of accommodation acceptances, will not defeat the title of an indorsee for value of an overdue bill or note, although the indorsee had notice of the fact when he took the bill, unless there were an agreement, express or implied, restraining the negotiation of the bill or note, after it should become due.(q) But the assignee of an overdue bill or note is not affected by an infirmity in the title of an original or antecedent party, if his immediate assignor could have maintained an action. A bill was accepted on a smuggling transaction, indorsed before it was due to a bona fide holder for value, and by the latter indorsed, after due to the plaintiff. Held, that as the indorser might have sustained an action against the acceptor, so could his indorsee.(r)

[*130] *An indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to

(o) In *Sturtevant v. Ford*, 4 M. & G. 101, E. C. L. R. vol. 43, Cresswell, J., says, "perhaps the better expression would be that he takes the bill subject to all its equities."

(p) *Tinson v. Francis*, 1 Camp. 19; *Brown v. Davis*, 3 T. R. 80; 7 T. R. 429; sed vide *Charles v. Marsden*, 1 Taunt. 224; *Atwood v. Crowdie*, 1 Stark. N. P. 483, E. C. L. R. vol. 2; *Bayley*, 6th ed. 161; *Chitty*, 9th ed. 218; *Roscoe*, 386. Quære, supposing it to have been *accepted* after it became due. See *Stein v. Yglesias*, 1 C. M. & R. 565; * 3 Dowl. 252; 1 Gale, 98, S. C. So stood the authorities till very lately. But the Court of C. P. in *Sturtevant v. Ford*, and the Court of Q. B. in *Lazarus v. Cowie*, and perhaps the Court of Exch. in *Stein v. Yglesias*, have recently upheld the authority of *Charles v. Marsden*, and it should now seem that an original absence of consideration is not one of those equities which attach on the instrument and defeat the title of an indorsee for value of an overdue bill, although with notice of the fact. See *Carruthers v. West*, 11 Q. B. Rep. 143, E. C. L. R. vol. 63.

(q) *Sturtevant v. Ford*, 4 M. & G. 101, E. C. L. R. vol. 43; *Lazarus v. Cowie*, 3 Q. B. Rep. 459, E. C. L. R. vol. 43; and see *Stein v. Yglesias*, 1 C. M. & R. 565.*

(r) *Chalmers v. Lanion*, 1 Camp. 383.

(1) The indorsement of a promissory note, after it is due, is equivalent to drawing a new bill payable at sight, and it must be proceeded with as such. *Bishop v. Dexter*, 2 Conn. 419; *Bank v. Burriew*, 1 Yeates, 360.

claims arising out of collateral matters. Therefore, the indorsee of an overdue note is not liable to a set-off due from the payee to the maker.(s)(1) Yet it should seem, that where a negotiable instrument is deposited as a security for the balance of accounts, and is afterwards indorsed overdue, in an action by the indorsee against the party originally liable, the state of the account may be gone into.(t)

Where the bill is deposited as a security for the balance of a running account, but at the time when the bill became due, the balance is in favor of the depositor, and the bill is not withdrawn by him, and afterwards the balance shifts in favor of the depositary, the depositary is not to be considered as the transferee of an overdue bill.(u)

This rule also applies to banker's checks, transferred a long time after they are issued. The owner of a check on a banker for 50*l.*, having lost it, the check was paid five days after its date to a shop-keeper, who received the amount at the bank: held, that the shop-keeper was liable to refund the money to the owner of the check; for, having taken it after due, he acquired no better title than the party from whom he took it, and that it lay on him to show that his assignor had a title. "A check," says Mr. Justice Holroyd, "is payable immediately, the holder of it keeps it at his peril, and a person taking it after it is due takes it also at his peril."(v)

But a distinction has been taken between the transfer of a bill or note payable at a fixed period and overdue, and the transfer of a check some days old. For, in the case of such a bill or note, there is a fixed time for payment, after which it cannot possibly circulate without some suspicion; but there is no such fixed time in the case of a check. And, therefore, it has been held, that though the taking of a check six days old is a circumstance from which the *jury may infer* negligence or fraud, it is not conclusive evidence of either, so as to

(s) *Burrough v. Moss*, 10 B. & C. 558, E. C. L. R. vol. 21; 5 M. & R. 296, S. C.; *Stein v. Yglesias*, 1 C. M. & R. 565; * 3 Dowl. 252; 1 Gale, 98, S. C. It has been thought that the indorsee would be affected by the set-off if he have notice of it at the time he takes the bill. *Goodall v. Ray*, 4 Dowl. 76. But it is now clear that notice makes no difference. *Whitehead v. Walker*, 11 L. J. Exch. 168; 9 M. & W. 506,* S. C.

(t) *Collenridge v. Farquarson*, 1 Stark 259, E. C. L. R. vol. 2.

(u) *Atwood v. Crowdie*, 1 Stark. 483, E. C. L. R. vol. 21.

(v) *Down v. Halling*, 4 B. & C. 330, E. C. L. R. vol. 10; 6 D. & R. 455; 2 C. & P. 11, E. C. L. R. vol. 12, S. C.

(1) *Hughes v. Large*, 2 Barr, 103; *Gullett v. Hoy*, 15 Missouri, 399.

prevent the party taking the check from suing on it, or retaining it, or the money received upon it.(w)(1)

[*131] *A note payable on demand is not to be considered as overdue, without some evidence of payment having been demanded and refused:(x) although it be several years old, and no interest has been paid on it. "A promissory note," says Mr. Baron Parke, "payable on demand, is intended to be a continuing security; it is quite unlike a check, which is intended to be presented speedily."(y)(2)

The fact that a note is overdue, must distinctly appear in pleading.(z)

Though the maker of a bill or note assigned when overdue may resist payment at law, equity has a concurrent jurisdiction, and will order the instrument to be delivered up to be cancelled, and restrain the holder from proceeding at law.(a)

The law, in the absence of any evidence on the subject, presumes a transfer to have been made before the bill was due.(b)(3)

(w) *Rothschild v. Corney*, 9 B. & C. 388, E. C. L. R. vol. 17; 4 M. & R. 411; Dans. & L. 325, S. C. See the Chapter on *Checks*.

(x) *Barough v. White*, 4 B. & C. 327, E. C. L. R. vol. 10; 6 D. & R. 379; 2 C. & P. 8, E. C. L. R. vol. 12, S. C.; see *Goodall v. Ray*, 4 Dowl. 76.

(y) *Brooks v. Mitchell*, 9 M. & W. 15; * *Cripps v. Davis*, 12 M. & W. 165; * see *Bartrum v. Caddy*, 9 Ad. & E. 275, E. C. L. R. vol. 36.

(z) *Cripps v. Davis*, 12 M. & W. 159.*

(a) *Hodgson v. Murray*, 2 Sim. 515; — *v. Adams, Younge*, 117.

(b) *Parkin v. Moon*, 7 C. & P. 408, E. C. L. R. vol. 32; *Lewis v. Lady Parker*, 4 Ad. & E. 838, E. C. L. R. vol. 31; 6 N. & M. 294, E. C. L. R. vol. 36; 2 Har. & W. 46, S. C.; *Cripps v. Davis*, 12 M. & W. 165.*

(1) The indorsee of a check, dated the day after he receives it, will not take it subject on that account to want of consideration between the drawer and indorser. *Walker v. Geisse*, 4 Whart. 252.

(2) A promissory negotiable note payable on demand, unless transferred within a reasonable time, will be considered overdue and dishonored, the English rule being modified in this country. *Carll v. Brown*, 2 Michigan, 401.

(3) It seems that in the absence of all proof as to the time when a note was indorsed, the court will presume that it was indorsed while current. *Washburn v. Ramsdell*, 17 Vermont, 299; *Burnham v. Webster*, 1 App. 232; *Burnham v. Wood*, 8 N. Hamp. 334; *Mobley v. Ryan*, 14 Illinois, 51; *Leland v. Farnham*, 25 Vermont, 553; *Andrews v. Chadbourne*, 19 Barbour, S. C. Rep. 147.

The indorsement of a note, in presumption of law, is contemporaneous with the making of it, or at all events antecedent to its becoming due; and if the defendant,

Where a banker, on whom a check is drawn, is also the banker of the bearer, and the check is paid in, there are two characters in which the banker may have received it, he may have received it merely as agent of the bearer, like any other securities which the bearer may have paid in on account: or he may have received it as drawee, and so by receiving it have paid it. Prima facie, he must be taken to have received it as agent of the bearer,^(c) and will discharge himself by giving timely notice of non-payment to the bearer;^(d) but if, while he keeps the check, the drawer pays in money, the banker is bound to appropriate that money to the payment of the check, though a larger balance is due to him from the drawer.^(e)

Where a man, to whom a bill is transferred, sends it back *as useless, that is an abandonment of his right as transferee, and [*132] he cannot, by getting the bill again into his hands, acquire a right to sue without a new transfer.^(f)

After *payment*, at maturity, by the acceptor or maker, bills or notes are extinguished and cannot be transferred,^(g) except promissory notes payable to bearer on demand, reissued by the original maker, having taken out a license for that purpose.^(h)

And an accommodation bill paid by the drawer at maturity cannot be reissued by him.⁽ⁱ⁾

And a note payable on demand which has been paid cannot be reissued by the maker, although the indorsee have no notice that

(c) *Boyd v. Emerson*, 2 Ad. & El. 184, E. C. L. R. vol. 29; 4 N. & M. 99, S. C.

(d) *Ibid.*

(e) *Kilsby v. Williams*, 5 B. & Ald. 815, E. C. L. R. vol. 7; 1 D. & R. 476, S. C.

(f) *Carthwright v. Williams*, 2 Stark. 340, E. C. L. R. vol. 3.

(g) 55 Geo. 3, c. 184, s. 19.

(h) Sections 14 and 24. Until a bill or note has been paid by the maker or acceptor, or on their behalf, it has not discharged its functions, and does not require a new stamp, though reissued after due, and after it has been paid by an indorser. *Callow v. Lawrence*, 3 M. & Sel. 95.

(i) *Lazarus v. Cowie*, 3 Q. B. Rep. 464, E. C. L. R. vol. 43.

in a suit by the indorsee, wishes to avail himself of payment to the original holder, it is incumbent on him to show that the indorsement was subsequent to the payment. *Pinkerton v. Bailey*, 8 Wend. 600.

A note assigned on the day of payment is assigned before it has become due. *Walter v. Kirk*, *Ibid.* 55.

the note has ever been paid, or that payment has ever been demanded. (k)(1)

"But a bill of exchange," says Lord Ellenborough, "is negotiable ad infinitum, until it has been paid by or discharged on behalf of the acceptor. If the drawer has paid the bill, it seems that he may sue the acceptor upon the bill; and if, instead of suing the acceptor, he put it into circulation on his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill, that the holder should be at liberty to sue the acceptor." (l) The drawer of a bill payable *to his own order*, indorsed it over, and, on the bill being

(k) *Bartrum v. Caddy*, 9 Ad. & E. 275, E. C. L. R. vol. 36; 1 Per. & D. 207, S. C.

(l) *Callow v. Lawrence*, 3 M. & Sel. 95; and see *Roberts v. Eden*, 1 B. & Pul. 398, and the observations of Patteson, J., on that case in *Bartrum v. Caddy*, 9 Ad. & E. 275, E. C. L. R. vol. 36; 1 Per. & D. 207, S. C.

(1) Where a note has been once paid, it ceases to be negotiable, as against those who would be prejudiced by the transfer. *Cochran v. Wheeler*, 7 N. Hamp. 202.

Where a bill of exchange, payable to A., is taken up by the drawer, and the indorsement of A. stricken out, it becomes dead to all intents and purposes as a negotiable instrument. *Price v. Sharp*, 2 Iredell, 417. A bill of exchange, promissory note, or order, made payable to a particular person, which has been paid by one whose duty it was to make the payment, without any right to call upon another party to repay the amount, is no longer a valid contract. It has performed its office and ceases to have a legal existence. But this principle does not hold good as to a bank note, which is not a contract with any particular person, but with any one who may become the bearer or holder of it. *Ballard v. Greenbush*, 24 Maine, 336.

Recovery of judgment against the maker of a note, destroys its negotiable quality, and it cannot be afterwards transferred so as to enable the holder to maintain an action in his name against an indorser. *Brown v. Foster*, 4 Alabama, 282; *Sawyer v. Bradford*, 6 Ibid. 572.

An indorser paying the note has the same right to an assignment of a judgment against the maker on the note that he has to the note itself. *State Bank v. Wilson*, 1 Dev. 484.

A promissory note may be reissued by an indorser after it is due; after it has been discounted in bank, and paid by him at maturity. *Kirksey v. Bates*, 1 Alabama, 303.

The indorsement of a bill by the payee to the acceptor operates to discharge the liabilities of all parties to it; and no action can afterwards be maintained upon it as a bill of exchange. Its negotiability is destroyed, and cannot be revived by the acceptor indorsing it to a third person. *Beede v. Real Estate Bank*, 4 Pike, 546.

Where the payee of a note having indorsed it, afterwards comes fairly to the possession of it again, he will be regarded, at least *prima facie*, as the proprietor of it, and may even at the trial strike out all subsequent indorsements, and recover upon it in his own name without a reindorsement to him. *Bond v. Storrs*, 13 Conn. 412.

dishonored, paid it to the holder, and afterwards indorsed it again. Held, that this last indorsee might recover against the acceptor.^(m) But, where the bill is drawn payable to a third person, is indorsed by him, dishonored and taken up by the drawer, who (the payee's indorsement still remaining) indorsed it to the plaintiff, it was held, that the plaintiff *could not recover against the acceptor; for [*133] in this case *the drawer had no title to indorse*, and the payee could not be rendered liable.⁽ⁿ⁾

If a bill or note be paid before it is due, and is afterwards indorsed over, it is a valid security in the hands of a bona fide indorsee. "I agree," says Lord Ellenborough, "that a bill paid at maturity cannot be reissued, and that no action can afterwards be maintained upon it by a subsequent indorsee. A payment before it becomes due, however, I think, does not extinguish it any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills and notes; for it would be impossible to know whether there had not been an anticipated payment of them. It is the duty of bankers to make some memorandum on bills and notes which have been paid, and if they do not, the holders of such securities cannot be affected by any payment made before they are due."^(o)

After a partial payment, at maturity, by the drawer, or any other party, the holder cannot recover of the acceptor more than the balance.^(p) For if that were not so, then if a drawer or indorser had paid the holder the whole amount of the bill, the holder might nevertheless sue the acceptor for the whole sum, for which an action would lie at the suit of the party who had paid him.

^(m) Ibid.; Hubbard v. Jackson, 3 C. & P. 134, E. C. L. R. vol. 14; 4 Bing. 390, E. C. L. R. vol. 13; 1 M. & P. 11, S. C. In this last case, the holder had recovered at law against the drawer, and then the drawer, without consideration, indorsed the bill over to the plaintiff; but Best, C. J., held, and the Court of C. P. confirmed his judgment, that the plaintiff might recover.

⁽ⁿ⁾ Beck v. Robley, 1 H. B. 89, n.

^(o) Burbidge v. Manners, 3 Camp. 193.

^(p) Bacon v. Searles, 1 Hen. Bla. 88, overruling Johnson v. Kennion, 2 Wils. 262; and see Pierson v. Dunlop, Cowp. 571. But see the observations of Eyre, C. J., in Walwyn v. St. Quintin, 1 B. & P. 654. However, the cases of Pierson v. Dunlop, and Bacon v. Searles, do not appear to have been brought under the notice of that learned Judge; and see Reid v. Furnival, 1 C. & M. 538; * 5 C. & P. 499, E. C. L. R. vol. 24, S. C. See the Chapter on *Payment*.

A question sometimes arises whether a bill have been paid or transferred. Though the holder give to a person taking up the bill a general receipt, importing that he has received payment, evidence is admissible to show that such person taking up the bill paid the money, not as agent for the acceptor or drawer, but as indorsee.(q)

A bill or note cannot be indorsed for part of the sum remaining due to the indorser upon it, if the limitation of the sum for which [*134] it is indorsed appear on the indorsement itself. *Such an indorsement is not warranted by the custom of merchants, and would be attended with this inconvenience to the prior parties, that it would subject them to a plurality of actions.(r) It is conceived, that the effect of such an indorsement, when attempted, is to give the indorsee a lien on the bill, but not to transfer a right of action, except in the indorser's name.

But if a bill or note be indorsed or delivered for a part of the sum due on it, and the limitation of the transfer do not appear on the instrument, the transferee is entitled to sue the maker or acceptor for the whole amount of the bill, and is a trustee of the surplus for the transferer.(s)(1)

If the bill have been partly paid, either by the acceptor or by the drawer, who for this purpose is the agent of the acceptor,(t) the bill may be specially indorsed for the part remaining due.(u)

A release at maturity, like a payment at maturity, operates as a complete extinction of the bill. But a premature release to a party liable on the bill, will not discharge the releasee as against an indorsee for value, before maturity of the bill and without notice.(v)

(q) *Graves v. Key*, 3 B. & Ad. 313, E. C. L. R. vol. 23. See *Hubbard v. Jackson*, 4 Bing. 390, E. C. L. R. vol. 13; 1 M. & P. 11, S. C.

(r) *Hawkins v. Cardy*, 1 Lord Raym. 360.

(s) *Reid v. Furnival*, 1 C. & M. 538; * 5 C. & P. 499, E. C. L. R. vol. 24, S. C.

(t) *Bacon v. Searles*, 1 Hen. Bla. 88.

(u) *Hawkins v. Cardy*, 1 Lord Raym. 360; *Carth.* 466, S. C.; and see *Johnson v. Kennion*, 2 Wils. 362.

(v) *Dod v. Edwards*, 2 C. & P. 602, E. C. L. R. vol. 12.

(1) A moiety of a promissory note cannot be assigned so as to enable the assignee to maintain an action in his own name for his portion of the note. *Miller v. Bledsoe*, 1 Scam. 530.

The holder cannot transfer after action brought, so as to give his transferee a right of action, provided the latter were aware that the action was commenced.^(w) But if the transferee had no notice, the transfer is good.^(x)

If the bill or note be under 5*l.*, no indorsement must be made after the bill is due; each indorsement must be dated; and the date must be at, or not before, the time of making, must specify the name and place of abode of the indorsee, and be attested by one subscribing witness at least.^(y)

Where a negotiable instrument is transferred abroad, by a mode of transfer valid here, but invalid there, or vice versa, a question may arise as to the validity to be attributed to such a transfer in our Courts. The general rule of law on this subject is, that a contract is to be governed by the law of the *country where it is made, but the [*135] remedy is to be moulded by the law of the country where it is sought.^(z) A bill is to be considered as made in the country where it is to be paid.

This subject will be considered more in detail in the subsequent Chapter on FOREIGN BILLS and FOREIGN LAW.

After the death of the holder his personal representatives should transfer.^(a) But where indorsement is necessary, and the testator has only written his name on the bill without delivery, the executor cannot complete the indorsement by delivery.^(b)

After the holder's bankruptcy his assignees should transfer, unless the bankrupt were merely agent or trustee. For the Bankrupt Laws have no operation on any property in the possession of the bankrupt, unless he have therein a beneficial interest.^(c)

The husband of a married woman, who acquires a right to a bill

(w) *Marsh v. Newell*, 1 Taunt. 109; *Jones v. Lane*, 3 Y. & C. 281.*

(x) *Colombier v. Slim*, K. B., T. T., 12 Geo. 3; Chit. 9th ed. 217.

(y) 17 Geo. 3, c. 30, s. 1.

(z) See the authorities collected in *Trimby v. Vignier*, 1 Bing. N. C. 152, E. C. L. R. vol. 27; 4 M. & Sc. 695; 6 C. & P. 25, E. C. L. R. vol. 25, S. C.

(a) See ante, Chapter V, *Executors*, and as to the question whether one of the several executors can indorse.

(b) *Bromage v. Lloyd*, 1 Exch. Rep. 32.*

(c) See the Chapter on *Bankruptcy*.

or note given to the wife, either before or during marriage, should indorse.(d)

Bankers have a general lien on all securities for money which are deposited with them, as bankers, in the way of their business. And therefore on bills and notes payable to bearer, or on Exchequer bills, although the customer who deposited them was not the real owner, and had no authority to give a lien;(e) but not on Exchequer bills delivered to them merely for the purpose of receiving the interest and exchanging them for new ones.(f)

The words goods and chattels, or either of them, in a testamentary instrument, will pass all the personal estate of the testator, including choses in action, such as bills and notes. But, where the bequest is of all goods and chattels in a particular place, bills and notes in general do not pass. But it has been considered, that such notes as are commonly treated as money will pass.(g)

[*136] *It may not be useless to subjoin a few words as to the extent to which bills or notes may be the subjects of a donatio mortis causa. The result of the cases seems to be, that though a bond(h) or a bank note are good donationes mortis causa,(i) and though the delivery of a bond and mortgage deeds will impose a trust upon the real and personal representatives in favor of the donee,(k) yet that the gift of a check drawn by the donor upon his banker, or of a promissory note, will not amount to a donatio mortis causa, and will have no greater effect in equity than at law.(l) The general rule appears to be, that a chose in action cannot so pass; but a bond, being a specialty, and having, in the eye of the law, a substantive existence and locality, independent of the value which it represents (being, for example, bona notabilia, in the place where the parchment lies), is an exception. And negotiable instruments, which are com-

(d) See Chapter V, *Married Women*.

(e) *Barnett v. Brandao*, 6 M. & G. 630, E. C. L. R. vol. 49.

(f) *Brandao v. Barnett*, 3 C. B. Rep. 519, E. C. L. R. vol. 54, Dom. Proc.

(g) *Stewart v. Bute*, 11 Ves. 662, S. C. in Dom. Proc.; 1 Dow. 73; see *Roper on Leg.* 224, 3d ed.; 2 Wms. on Exors. 648 and 942, 3d ed.

(h) *Snellgrove v. Bailey*, 3 Atk. 214.

(i) *Drury v. Smith*, 1 P. W. 405; *Miller v. Miller*, 3 P. W. 356.

(k) *Duffield v. Elwes*, 1 Bligh, 499.

(l) *Tate v. Hilbert*, 2 Ves. Jun. 111.

monly treated as money for other purposes, may, like money, pass as a *donatio mortis causa*, while such bills or notes as are not commonly used for money, as a check or common promissory note, though payable to bearer, will not be within the exception. Nor is it probable that future decisions will hold notes or checks to be objects of a *donatio mortis causa*,^(m) for the Courts lean against this sort of disposition. "Improvements in the law," says Lord Eldon, "or some things which have been considered improvements, have been lately proposed, and if among those things called improvements, this *donatio mortis causa* was struck out of our law altogether, it would be quite as well."⁽ⁿ⁾(1)

A *donatio mortis causa* may be made subject to a condition or trust.^(o)

Bills or notes could not at common law be taken in execution, at the suit of a subject; nor, if taken, could the sheriff or his assignee acquire a title against the other parties to the instruments, they being only assignable by the custom of merchants, in the way of ordinary mercantile transfer. And such as more nearly resemble money than securities, as bank notes, were, like money, not subject to be taken in execution.^(p)

*But now, by the 1 & 2 Vict. c. 100, s. 12, money, bank notes, checks, bills and promissory notes, with all other secu-^[*137]

(m) But see *Ranken v. Weguelin*, Rolls, June, 1832; *Chitty*, 9th ed. 2.

(n) *Duffield v. Elwes*, 1 Bligh, 533, A.D. 1827. There must be an actual transfer. *Bunn v. Markham*, 2 Marshall, 532.

(o) *Blount v. Burrow*, 3 Bro. Ch. Ca. 72; *Hills v. Hills*, 10 L. J. Ex. 440; 8 Mees. & W. 401,* S. C.

(p) *Francis v. Nash*, Rep. temp. Hardwicke, 53; *Knight v. Criddle*, 9 East, 48; *Fieldhouse v. Croft*, 4 East, 510.

(1) See ante, p. 18, note 1, as to Checks. It is settled by a concurring train of decisions in the American Courts that a promissory note of a third person held by the donor, is a good subject of a gift *causa mortis*. *Grover v. Grover*, 24 Pick. 261; *Brown v. Brown*, 18 Conn. 410; *McConnell v. McConnell*, 11 Vermont, 290; *Sessions v. Moseley*, 4 Cushing, 87; *Jones v. Deyer*, 16 Alabama, 221; *Constant v. Schuyler*, 1 Paige, 316.

A promissory note, however made by the donor, in favor of the donee, cannot be the subject of such a gift. The want of consideration may be taken advantage of in an action by the donee against the executors or administrators of the donor. *Bowers v. Hurd*, 10 Mass. 427; *Parish v. Stone*, 14 Pick. 198; *Holley v. Adams*, 16 Vermont, 206; *Smith v. Kittridge*, 21 Ibid. 238; *Bradley v. Hunt*, 5 Gill. & Johns. 54; *Parker v. Marston*, 27 Maine, 196. The contrary was indeed held in *Wright v. Wright*, 1 Cowen, 598. But that case has been expressly overruled. *Craig v. Craig*, 3 Barbour, Ch. Rep. 76; *Harris v. Clark*, 3 Comstock, 93.

rities for money, may be seized under a writ of fieri facias. The sheriff is to deliver the money and bank notes to the execution creditor, and is to receive payment, or to sue in his own name, being indemnified by the plaintiff, on the checks, bills, or notes.

But if the creditor, before receiving payment, proceeds against the person of the defendant, he forfeits the benefit of the securities.(g)

Bills and notes are liable to be seized under an extent.(r)

Bills or notes are not the subjects of larceny at the common law; for bills or notes are choses in action, and a chose in action cannot be stolen. But, by the 7 & 8 Geo. 4, c. 29, s. 5, the stealing of any bill, note, warrant, or order for the payment of money, is made felony, of the same nature, and in the same degree, and punishable in the same manner, as larceny of any chattel of like value with the money due on the security.

The embezzlement of bills or notes by clerks or servants is felony.(s)

The embezzlement of bills or notes by agents, not being clerks or servants, or the selling, negotiating, or pledging them, in violation of the purpose for which, by a written direction, they were intrusted, and the disposing of them for the agents' own benefit, is a misdemeanor subjecting to transportation.(t)

Where a man is both entitled and liable on the face of a bill, or liable to contribute, though his liability do not appear on the face of the instrument, he cannot sue. But the technical difficulty may be removed by indorsement or transfer,(u) before the bill is due.

Eighthly, as to the circumstances under which equity will restrain negotiation. A Court of equity will interpose to restrain the negotiation of a bill unduly obtained; for the defence at law may not be available as against an innocent indorsee for value, or time may destroy the evidence;(v) and will, on equitable terms, decree a bill

(g) Sec. 16.

(r) West, 27, 28; 164-5.

(s) 7 & 8 Geo. 4, c. 29, s. 47.

(t) 7 & 8 Geo. 4, c. 29, s. 49.

(u) See *Steele v. Harmer*, 15 L. J. 217, Exch.; 14 M. & W. 831,* S. C.; and 19 L. J. Exch. 34, in error, and ante, p. 31.

(v) *Bromley v. Holland*, 7 Ves. 20, 413; *Bishop of Winchester v. Fournier*, 2 Ves. Jun. 483; 3 Ves. 757; 9 Ves. 355. As to the parties to the suit, see *Toley v. Carlon*, 1 Younge, 373. But the Court will not order a bill to be delivered up unless the plaintiff has a right to the possession, and the defendant's detention of the bill is inequitable. *Jones v. Lane*, 3 Y. & C. 281.* In *Thretfall v. Lunt*, 7

*void in its creation, or unduly obtained, to be delivered up to be cancelled.^(w) [*138]

*CHAPTER XII.

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OF THE PRESENTMENT FOR ACCEPTANCE.

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It is in all cases advisable for the holder of an unaccepted bill to present it for acceptance without delay; for, in case of acceptance the holder obtains the additional security of the acceptor, and, if acceptance be refused, the antecedent parties become liable immediately. It is advisable, too, on account of the drawer, for, by receiving early advice of dishonor, he may be better able to get his effects out of the drawee's hands.

But presentment for acceptance is not necessary in the case of a bill payable at a certain period after date.⁽¹⁾ It is said, however,

Sim. 627, a demurrer was allowed to a bill for the delivery up of a bill of exchange, the amount of which the defendant had recovered at law, and had received from the plaintiff; but see *Pinkus v. Peters*, 6 Jurist, 431.

(w) 2 Ves. Jun. 488; 7 Ves. 413; 2 Ves. & Beam. 302; *Mackworth v. Marshall*, 3 Sim. 368. So where the name of the payee, as indorser, was forged, a bona fide holder was restrained from suing the acceptor, and the Court directed the bill to be delivered up to be cancelled. *Esdale v. La Nauze*, 1 Y. & Col. 394;* *Jones v. Lane*, 3 Y. & C. 281.*

(1) A bill payable at a given time after date need not be presented for acceptance; payment may be at once demanded at its maturity. *Bank of Washington v. Triplett*, 1 Peters, S. C. 25; *Townsley v. Sumrall*, 2 Ibid. 170.

A bill of exchange payable at a time certain, need not be presented for acceptance until maturity; but if it is and is dishonored, notice and protest is necessary. *Carmichael v. Pennsylvania Bank*, 4 Howard, Miss. 567; *Bank of Bennington v. Raymond*, 12 Vermont, 401; *Glasgow v. Copeland*, 8 Missouri, 268.

that it is incumbent on a holder who is a mere agent, and on the payee, when expressly directed by the drawer so to do, to present the bill for acceptance as soon as possible; and that, for loss arising from the neglect, the payee must be responsible, and the agent must answer to his principal.(a)

Presentment for acceptance is necessary, if the bill be drawn payable at sight, or at a certain period after sight. Till such presentment there is no right of action against any party; and unless it be made within a reasonable time, the holder loses his remedy against the antecedent parties.

What is a reasonable time, depends on the circumstances of each particular case, and is a mixed question of law and fact;(b) although reasonable time in general, and reasonable *time for giving [*140] notice of dishonor in particular, is clearly a question of law. Plaintiff, on Friday, the 9th, at Windsor, twenty miles from London, received a bill on London, at one month after sight, for 100*l*. There was no post on Saturday. It was presented on the Tuesday. The jury thought it was presented within a reasonable time, and the Court concurred.(c)(1)

A bill drawn by bankers in the country on their correspondents in London, payable after sight, was indorsed to the traveller of the plaintiffs. He transmitted it to the plaintiffs after the interval of a week, and they, two days afterwards, transmitted it for acceptance. Before it was presented to the drawees, the drawer had become bankrupt; the drawees, consequently, refused to accept. Had the bill been sent by the traveller to the plaintiffs, his employers, as soon as

(a) Chit. 9th ed. 273; Poth. 128; Marius, 46.

(b) *Muilman v. D'Eguino*, 2 H. Bl. 565; *Fry v. Hill*, 7 Taunt. 395, E. C. L. R. vol. 2; *Shute v. Robins*, 1 M. & M. 133, E. C. L. R. vol. 22; 3 C. & P. 80, E. C. L. R. vol. 14, S. C.; *Mellish v. Rawdon*, 9 Bing. 416, E. C. L. R. vol. 23; 2 M. & Sc. 570, S. C.

(c) *Fry v. Hill*, 7 Taunt. 395, E. C. L. R. vol. 2.

(1) There is no fixed rule for the presentment of a bill payable at sight or a certain number of days after sight; but the holder must use due diligence to put the bill into circulation, and it must be presented within a reasonable time. *Robinson v. Ames*, 20 Johns. 146; *Wallace v. Agry*, 4 Mason, 336; S. C., 5 Mason, 118; *Aymar v. Beers*, 7 Cowen, 705; *Bachelor v. Priest*, 12 Pick. 399. A bill payable on demand must be presented within a reasonable time, or the drawer will be discharged. *Etting v. Shook*, 2 Hall, 459; see *Dumont v. Pope*, 7 Blackford, 367.

he received it, they would have been able to get it accepted before the bankruptcy. "This is," says Lord Tenterden, "a mixed question of law and fact; and, in expressing my own opinion, I do not wish at all to withdraw the case from the jury. Whatever strictness may be required with respect to common bills of exchange, payable after sight, it does not seem unreasonable to treat bills of this nature drawn by bankers on their correspondents, as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them, within a moderate time (for indefinite delay, of course, cannot be allowed), as part of the circulating medium of the country." The jury concurred with his Lordship, that the delay was not unreasonable: (d) Where the purchaser of a bill on Rio Janeiro, at sixty days' sight, the exchange being against him, kept it nearly five months, and the drawee failed before presentment, it was held that the delay was not unreasonable. "The bill," says Tindal, C. J., "must be forwarded within a reasonable time under all the circumstances of the case, and there must be no unreasonable or improper delay. Whether there has been, in any particular case, reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the jury, acting under the direction of the Judge, upon the particular circumstances of each case." (e)

But where a bill, payable after sight, was drawn in duplicate on the 12th of August, in Newfoundland, and not presented for acceptance in London till November 16, and no circumstances were proved to excuse the delay, it was held *unreasonable, (f) the Court laying some stress on the fact that the bill was drawn in sets. [*141]

Presentment should be made during the usual hours of business. (g) (1)

The holder may, however, put the bill into circulation without presenting it. "If a bill, drawn at three days' sight," says Mr. Justice

(d) *Shute v. Robins*, 1 M. & M. 133, E. C. L. R. vol. 22; 3 C. & P. 80, E. C. L. R. vol. 14, S. C.

(e) *Mellish v. Rawdon*, 9 Bing. 416, E. C. L. R. vol. 23; 2 M. & Sc. 570, S. C.

(f) *Straker v. Graham*, 4 M. & W. 721.*

(g) Mar. 112.

(1) Business hours, except in the case of banks, range through the whole day down to the hours of rest in the evening. *Cayuga Bank v. Hunt*, 2 Hill, 635; *Nehon v. Fotteral*, 7 Leigh, 179.

Buller, "be kept out in circulation for a year, I cannot say that there would be *laches*; but if, instead of putting it into circulation, the holder were to lock it up for any length of time, I should say that he would be guilty of *laches*."(*h*) "But this cannot mean," says Tindal, C. J., "that keeping it in hand for any time, however short, would make him guilty of *laches*. It never can be required of him instantly on receipt of it, under all disadvantages, to put it into circulation. To hold the purchaser bound by such an obligation would impede, if not altogether destroy, the market for buying and selling foreign bills, to the great injury, no less than to the inconvenience, of the drawer himself."(*i*) Two bills, one for 400*l.*, the other for 500*l.*, were drawn from Lisbon, on May 12, at thirty days after sight, indorsed to G. at Paris, and by G. to R. at Genoa, and by R. indorsed over. They were not presented for acceptance till 22d August. The jury found, and the court concurred, that the bills were, under the circumstances, presented within a reasonable time.(*k*)

Illness or other reasonable cause, not attributable to the misconduct of the holder, will excuse. But the holder must present, though the drawer have desired the drawee not to accept.(*l*)

The presentment must be made either to the drawee himself, or to his authorized agent. The holder's servant called at the drawee's residence and showed the bill to some person in the drawee's tanyard, who refused to accept it; but the witness did not know the drawee's person, nor could he swear that the person to whom he offered the bill was he, or represented himself to be so. Lord Ellenborough, "The evidence here offered proves no demand on the drawee, and is, therefore, insufficient."(*m*)

[*142] *When the bill is presented, it is reasonable that the drawee should be allowed some time to deliberate whether he will accept or no. It seems that he may demand twenty-four hours for this purpose (and that the holder will be justified in leaving the bill with him for that period); at least, if the post do not go out in the in-

(*h*) *Muilman v. D'Eguino*, 2 H. Bl. 565.

(*i*) *Mellish v. Rawdon*, 9 Bing. 416, E. C. L. R. vol. 23; 2 M. & Sc. 570, S. C.

(*k*) *Goupy v. Harden*, 7 Taunt. 160, E. C. L. R. vol. 2; 2 Marsh. 454, E. C. L. R. vol. 4, S. C.

(*l*) *Hill v. Heap, D. & R.*, N. P. C. 57.

(*m*) *Cheek v. Roper*, 5 Esp. 175.

terim,(*n*) or unless, in the interim, he either accepts or declares his resolution not to accept.(*o*) If more than twenty-four hours be given, the holder ought to inform the antecedent parties of it.(*p*)

If the owner of a bill who leaves it for acceptance, by his negligence enables a stranger to give such a description of it as to obtain it from the drawee, without negligence on his part, the owner cannot maintain trover for it against the drawee.(*q*)

In case the bill is directed to the drawee at a particular place, it is to be considered as dishonored if the drawee has absconded.(*r*) But, if he have merely changed his residence, or if the bill is not directed to him at any particular place, it is incumbent on the holder to use due diligence to find him out. And due diligence is a question of fact for the jury.(*s*) If the drawee be dead, the holder should inquire after his personal representative, and, provided he live within a reasonable distance, present the bill to him.(*t*)

In an action against the drawer on non-acceptance, it is not sufficient to allege mere non-acceptance, presentment for acceptance must be alleged.(*u*)

(*n*) Marius, 15; Com. Dig. Merch. F. 6; Bellasis v. Hester, 1 Ld. Raym. 281.

(*o*) Bayley, 194, 6th ed.

(*p*) Ingram v. Foster, 2 Smith, 242.

(*q*) Morrison v. Buchanan, 6 C. & P. 18, E. C. L. R. vol. 25.

(*r*) Anon. 1 Ld. Raym. 743.

(*s*) Collins v. Butler, 2 Stra. 1087; Bateman v. Joseph, 12 East, 433.

(*t*) Chitty, 9th ed. 357.

(*u*) Mercer v. Southwell, 2 Show. 180.

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*CHAPTER XIII.

OF ACCEPTANCE.

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ACCEPTANCE, in its ordinary signification, is an engagement by the drawee to pay the bill when due, (a) in money. (b)

An instrument drawn by A. upon B., requiring him to pay to the order of C. a certain sum at a certain time "without acceptance," is a bill of exchange, and may be so described in an indictment for forgery. (c)

We have already seen, that without acceptance a banker may be liable to his customers, if, having sufficient funds, he neglect to pay his checks.

A banker, at whose house a customer accepting a bill makes it payable, *is liable to an action at the suit of that customer, if he [*144] refuse to pay it, having at the time of presentment funds suffi-

(a) Clark v. Cock, 4 East, 72.

(b) Russell v. Phillips, 19 L. J. 297, Q. B.

(c) Miller v. Thomson, 3 M. & G. 576, E. C. L. R. vol. 42; Reg. v. Kinnear, 2 M. & Rob. 117.

cient, and having had those funds a reasonable time, so that his clerks and servants might know it.(d)

Where a bill is accepted payable at a banker's, though money had been remitted by the acceptor to the banker for the express purpose of paying the bill, the banker is not liable to the holder in an action for money had and received, unless he have assented to hold the money for the purpose for which it was remitted.(e) But where there is anything in the conduct or situation of the banker, which amounts to an assent to hold the remittance upon trust to discharge the bill, he is liable to the holder.(f)

A bill can only be accepted by the drawee,(g) and not by a stranger, except for honor.(h) Where, indeed, the bill was not addressed to any one, but only indicated the place of payment, the acceptor was held liable as having admitted himself to be the party pointed out by the place of payment.(i) But this decision goes to the very verge of the law.(k)

If the drawee be incompetent to contract, as, for example, by reason of infancy or coverture,(l) the bill may be treated as dishonored.

We have already seen(m) that one partner may, by his acceptance, bind his copartner. But, if a bill be drawn upon several persons not in partnership, it should be accepted by all, and, if not, may be treated as dishonored.(n) Acceptance will, however, be binding upon such as do make it.(o)

There cannot be two or more separate acceptors of the same bill

(d) See *Whitaker v. The Bank of England*, 6 C. & P. 700, E. C. L. R. vol. 25, and 1 C. M. & R. 744;* 1 Gale, 54, S. C.

(e) *Williams v. Everett*, 14 East, 582; *Yates v. Bell*, 3 B. & Ald. 643, E. C. L. R. vol. 5; *Wedlake v. Hurley*, 1 C. & J. 83.*

(f) *De Bernales v. Fuller*, 14 East, 590, n.; 2 Camp. 426; and see the observations of Abbott, C. J., on this case, in *Yates v. Bell*, 3 B. & Ald. 643, E. C. L. R. vol. 5.

(g) Unless he have recognized the acceptance as his. See *Lindus v. Bradwell*, 5 C. B. Rep. 583, E. C. L. R. vol. 57.

(h) *Polhill v. Walter*, B. & Ad. 114; 1 L. J. 92, K. B.; *Davis v. Clarke*, 13 L. J., Q. B. 305; 6 Q. B. Rep. 16, E. C. L. R. vol. 51, S. C.; see *Jenkins v. Hutchinson*, 18 L. J. 274.

(i) *Gray v. Milner*, 8 Taunt. 739, E. C. L. R. vol. 4.

(k) See the observations of Patteson, J., in *Davis v. Clarke*, *supra*.

(l) Chit. 9th ed. 283.

(m) Chapter II.

(n) Mar. 16, *Dupays v. Shepherd*, Holt's Rep. 297; *Marius*, 64.

(o) B. N. P. 270; *Bayley*, 58; *Owen v. Von Uster*, C. P., M. T. 1850.

not jointly responsible. A. refused to supply B. with goods, unless C. would become his surety. C. agreed to do it. Goods to the value [*145] of 157*l.* were accordingly sold by A. *to B. For the amount A. drew on B., and the bill was accepted both by B. and C., each writing his name on it. Lord Ellenborough, "If you had declared that, in consequence of A. selling the goods to B., C. undertook that the bill should be paid, you might have fixed C. by this evidence. But I know of no custom or usage of merchants, according to which, if a bill be drawn upon one man, it may be accepted by two; the acceptance of the defendant is contrary to the usage and custom of merchants. A bill must be accepted by the drawee, or, failing him, by some one for the honor of the drawer. There cannot be a series of acceptors. The defendant's undertaking is clearly collateral, and ought to have been declared upon as such."(*p*) But although there can be no other acceptor after a general acceptance of the drawee, it is said that, when a bill has been accepted *supra protest*, for the honor of one party, it may, by another individual, be accepted *supra protest* for the honor of another.(*q*) We shall, hereafter, consider the subject of acceptance *supra protest* in a distinct Chapter. A bill may, as we have seen,(*r*) be addressed to the drawer himself and accepted by him; but it is then rather a promissory note than a bill.

We have already seen that the signature of a drawer, maker, or indorser, of a negotiable instrument on a blank form, will bind them respectively; so an acceptance, written on the paper before the bill is made, will also charge the acceptor to the extent warranted by the stamp.(*s*)(1)

(*p*) *Jackson v. Hudson*, 2 Camp. 447.

(*q*) *Ibid.*, *u.*, Beawes, 42.

(*r*) Chapter VII.

(*s*) It is not even necessary that the bill should be drawn by the same person to whom the acceptor handed the blank acceptance. *Schultz v. Astley*, 2 Bing. N. C. 544, E. C. L. R. vol. 29; 2 Scott, 815; 1 Hodges, 525; 7 C. & P. 99, E. C. L. R. vol. 32, S. C.

(1) A person signing his name on a blank paper, and delivering it to another, authorizes him to fill up the blank with any sum. *Bank of Limestone v. Penick*, 5 Monr. 25.

Where a note is signed and delivered, with a blank left for the sum payable, though the first holder is restricted as to the amount to be inserted, yet, if the note comes into the hands of another, who, without notice of the restriction, fills the blank with a larger sum, the maker will be bound by it. *Bank of Commonwealth v. Curry*, 2 Dana, 142; *Moody v. Threlkeld*, 13 Georgia, 55.

It was formerly held (in cases where an acceptance in writing on the bill was not necessary), that a promise to accept, given *before the bill was made*, amounted to an acceptance. Thus, a promise by the defendants, that they would accept such bills as the plaintiff should in about a month's time draw on the defendant, for 800*l.*, has been held an acceptance of such bill subsequently drawn.^(t) But it was said that a subsequent holder could not avail himself of such an engagement, unless it was communicated to him at the time he took the bill. "A promise to accept," says Gibbs, C. J., "not communicated to the person who takes the bill, does not amount *to an acceptance; but, if the person be thereby induced to take a [*146] bill, he gains a right, equivalent to an actual acceptance, against the party who has given the promise to accept."^(u) But it is now settled that there cannot be a verbal acceptance of a non-existing bill,^(v) although the bill be discounted by the drawer on the faith of a promise to accept.^(w) It has been decided, since 1 & 2 Geo. 4, c. 78, that an acceptance may be written before the bill is drawn, though that statute makes it essential to the acceptance of an inland bill, that it should be in writing *on such bill*; and it will be no variance, though the declaration state the drawing to have been first and the acceptance afterwards.^{(x)(1)}

(t) *Pillans v. Van Mierop*, 3 Burr. 1663; *Pierson v. Dunlop*, Cowp. 571; *Mason v. Hunt*, Doug. 284, 287.

(u) *Milne v. Prest*, 4 Camp. 393; *Holt*, N. P. 181, S. C., evidently an inaccurate report, in *Holt*, see 11 M. & W. 390; **Johnson v. Collings*, 1 East, 98.

(v) *Johnson v. Collings*, 1 East, 98; *Bank of Ireland v. Archer*, 11 M. & W. 383.*

(w) *Ibid.*

(x) *Molloy v. Delves*, Bing. 428; 5 M. & P. 275; 4 C. & P. 492, E. C. L. R. vol. 19, S. C.

(1) A promise in writing made before a bill is drawn to accept the bill, will not be held to amount to an actual acceptance, unless the bill is clearly described and identified from other bills. *Ulster County Bank v. McFarlan*, 3 Denio, 553.

A letter written by the drawee of a bill of exchange, before or after the drawing of the bill, promising to accept or protect the bill, may operate as an acceptance, although the holder may not be apprised of such letter and thereby induced to receive the bill. *Read v. Marsh*, 5 Monroe, 8.

A letter written within a reasonable time before or after the date of a bill, intelligibly describing it, and promising to accept it, is, if shown to one who takes it on the credit of the letter, a virtual acceptance, binding on the promisor. *Payson v. Coolidge*, 2 Gallison, 233; S. C., 2 Wheaton, 66; *Goodrich v. Gordon*, 15 Johns. 6; *Schimmelpennick v. Bayard*, 1 Peters, 265; *Towsley v. Sumrall*, 2 Peters, 181; *Wilson v. Clements*, 3 Mass. 1; *Storer v. Logan*, 9 Mass. 55; *McKim v. Smith*, 1

A bill may be accepted after the period at which it is made payable has elapsed, and the acceptor will then be liable to pay on de-

Hall's Law Journal, 486; Parker v. Grule, 2 Wendell, 545; 5 Wendell, 414; Boyce v. Edwards, 4 Peters, 111; Williams v. Winans, 2 Green, 339; Russel v. Wiggin, 2 Story, 213; Bayard v. Lathy, 2 McLean, 462; Kennedy v. Geddes, 8 Porter, 263; 3 Alabama, 581; Ulster Bank v. McFarlan, 5 Hill, 433.

An authority given by A. to B. to draw bills on him, is virtually an acceptance of any bills drawn in conformity with such authority. Van Reimsdyk v. Kane, 1 Gallison, 630; Banorger v. Hovey, 5 Mass. 23; Mayhew v. Prince, 11 Mass. 55; Wallace v. Agry, 4 Mason, 336.

When an implied acceptance, based on an authority to draw, previously given, is relied on, a recovery cannot be had against a party as acceptor by virtue of such authority, unless it be proved that the party discounting the bill, before or at the time of so doing, saw or knew of the authority, and discounted on the faith thereof. Lewis v. Cramer, 3 Maryland, 265.

A bill drawn by one upon himself is to be regarded as an accepted bill. Cunningham v. Wardwell, 3 Fairfield, 466.

No formal acceptance of a bill of exchange drawn by a corporation on itself is necessary, the act of drawing being deemed an acceptance of it. Hasey v. White Pigeon Beet Sugar Company, 1 Douglas, 193.

The act of drawing a bill by one partner, in his own name, on the firm of which he is a member, for the use of the partnership, is in law an acceptance by the drawer in behalf of the firm, and an action may be maintained against the firm as on an accepted bill. Dougal v. Cowles, 5 Day, 511.

By the Revised Statutes of New York, an acceptance is void unless made in writing. But prior to this provision, a parol agreement to accept a bill to be drawn in futuro, could not be enforced by an indorsee who did not take the bill on the faith of such agreement. Ontario Bank v. Worthington, 12 Wendell, 593; McEvers v. Mason, 10 Johns. 207; Goodrich v. Gordon, 15 Johns. 6. See Martin v. Bacon, 2 Rep. Const. Court, 132.

A mere verbal promise to accept a bill of exchange not yet drawn, is not such an acceptance as will in law bind the acceptor, even if made to the person in whose favor the bill is drawn. Kennedy v. Geddes, 8 Porter, 263. By the English law, a promise to accept a non-existing bill of exchange, even though it be taken by the holder upon the faith of that promise, does not amount to an acceptance of the bill when drawn in favor of the holder; but it has been held otherwise by the Supreme Court of the United States. Yet if the bill be payable after sight, and not after date, such a promise has never been held, in either country, to be an acceptance of a non-existing bill. Coolidge v. Payson, 2 Wheaton, 66; Wildes v. Savage, 1 Story, 22; Russell v. Wiggin, 2 Story, 213. In the former of these cases Judge Story said: "It is, perhaps, to be lamented that the doctrine of such virtual acceptances ever was established; and if the question had been entirely new, I am well satisfied that it would not have been recognized as fit to be promulgated, it being at once unsound in policy and full of inconvenience. But the Supreme Court yielded, as did the Judge who decided that case in the Circuit Court, to what seemed at that time the true result of the English authorities upon an important practical commercial question. I am not sorry to find that professional opinion has now settled

mand; yet, if the declaration state the acceptance to be *according to its tenor and effect*, those words will be but surplusage.(y)(1) It may also be accepted after a previous refusal to accept.(z)(2)

(y) *Jackson v. Pigott*, 1 Ld. Raym. 364; *Mutford v. Walcot*, 1 Ld. Raym. 574; 1 Salk. 129, S. C.; *Stein v. Yglesias*, 5 Tyr. 172; 1 C. M. & R. 565;* 1 Gale, 98, S. C. Quære, if there be an issue raised as to the time when an acceptance not dated was given, whether before or after the maturity of the bill, on whom will the burden of proof lie? It is conceived on the party alleging the bill to have been accepted after it was due.

(z) *Wynne v. Raikes*, 5 East, 514; 2 Smith, 89, S. C.

down in England against the doctrine; although there is no pretence to say, that, up to this very hour, there has been any formal decision in Westminster Hall against it. But it does not appear to me that the doctrine ever was applicable or could be applied to any bills of exchange except such as were payable on demand or at a fixed time after date. Where bills are drawn payable at so many days after sight, it is impracticable to apply the doctrine; for there remains a future act to be done, the presentment and sight of the bill, before the period for which it is to run, and at which it is to become payable, can commence, whether it be accepted or be dishonored. How can the time be calculated on such a bill before it is presented? If a letter is written, promising to accept a non-existing bill, to be thereafter drawn, at six months' sight, when is the acceptance to be deemed made? At the date of the bill? Certainly not: for that would be at war with the obvious intent of the parties, which plainly is, that the acceptance shall be on a future sight of the bill. If it is said that the acceptance is to be treated as made when the bill is actually presented for acceptance and it is dishonored by the drawee, it is as plain that we set up a prior intent or promise against the fact. Upon what ground can a court say, when a party promises to do an act in futuro, such, for example, as to accept a bill when it shall be drawn and presented to him at a future time, that his promise overcomes his act at that time? That his refusal to perform his promise amounts to a performance of it? It is quite another question whether the holder, who has taken such a bill upon the faith of such a promise, may not have some other remedy, either at law or in equity, for the breach of it, against the promisor. My judgment is, that the doctrine of a virtual acceptance of a non-existing bill, by a prior promise to accept it, when drawn, has no application to a bill drawn payable at some fixed period after sight; for it then amounts to no more than a promise to do a future act. I have looked into the authorities, and do not find in any one of them, that the bill drawn, and to which the doctrine was applied, was a bill drawn payable at or after sight."

A parol promise to accept a draft, founded on no new consideration, is not binding, either as an acceptance or a binding promise to accept. *Strohecker v. Cohen*, 1 Speers, 349.

(1) Acceptance after time of payment is binding. *Williams v. Winans*, 2 Green, 339.

(2) If on protest for non-acceptance of a bill payable at so many days after sight, the drawer accepts the next day and fails before the day of payment, the drawer is not liable, if he had no notice of the non-acceptance. *Mitchell v. De Grund*, 1 Mason, 176.

The statute 3 & 4 Anne, c. 9, s. 5, expressly enacts, that no acceptance of any inland bill of exchange shall be sufficient to charge any person whatever, unless it be underwritten, or indorsed in writing on the bill. This statute, however, seems to be very loosely and obscurely drawn. Two Chief Justices accordingly held, on considering the whole of the act, that a verbal acceptance was binding, notwithstanding these words; which decision was finally settled to be law by Lord Hardwicke.^(a) It had often been lamented by the Judges, that anything short of a writing on the bill should have been considered as an acceptance; and at length, in accordance with the opinions of the Bench, and perhaps, of the Legislature, in framing [*147] the last-mentioned act, the 1 & 2 Geo. 4, c. 78, s. 2, *enacted, that no acceptance of any *inland*^(b) bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts.

The usual and regular mode of making such an acceptance on the bill, is by writing the word "*accepted*," and subscribing the drawee's name. Signature is not essential to a written acceptance within this statute, but it is a question for the jury, whether the acceptance is complete.^(c) If the bill be payable after sight, the day when accepted should also be expressed. But the drawee's name alone written on any part of the bill, is a sufficient acceptance; so, without any name, the word "*accepted*," "*presented*," "*seen*," the day of the month, or a direction to a third person to pay it.^(d) Where one banker held a check drawn on another banker, presented it after four o'clock, and it was not paid, but according to the practice of the London bankers, a mark was put on it to show the drawer had effects, and that it would be paid, this marking was held to amount to an acceptance payable the next day at the clearing-house.^(e) It is still not necessary, in pleading the acceptance of an inland bill, to aver that the acceptance was in writing.^(f)

(a) *Lumley v. Palmer*, 2 Str. 1000; Rep. t. Hardwicke, 74, S. C.

(b) As to what is an inland and what a foreign bill, see the Chapter on *Foreign Bills*.

(c) *Dufaur v. Oxenden*, 1 M. & R. 90.

(d) *Anon. Comb.* 401; *Powell v. Monnier*, 1 Atk. 611; *Moor v. Withy*, B. N. P. 270; *Dufaur v. Oxenden*, 1 M. & R. 90.

(e) *Robson v. Bennett*, 2 Taunt. 388.

(f) *Chalie v. Belshaw*, 6 Bing. 529, E. C. L. R. vol. 19; 4 M. & P. 275, S. C.

It will be observed, that the 1 & 2 Geo. 4, c. 78, so far as it relates to acceptances^{*} in writing, does not extend to foreign bills. It is necessary, therefore, to consider the state of the law previously to this enactment, in respect of acceptances not on the bill, as it still applies to acceptances of bills drawn or accepted abroad.

We have already seen, (g) that a promise to accept a bill, not drawn, will not be available as an acceptance; but a promise, written or verbal, to pay or accept an existing foreign bill, is of itself an acceptance. (h)(1)

And such an acceptance may be given to the drawer, or any other party to the bill, after it has been indorsed away, and *even after it has become due. (i) It may even be given to a person [*148] by whose direction and on whose account the bill was drawn, though he be no party to the bill, and although the bill has been previously

(g) Note (v), p. 146.

(h) *Clarke v. Cook*, 4 East, 57; *Cox v. Coleman*, Bayley, 6th ed. 176; *Wynn v. Raikes*, 5 East, 514; *Mendizabal v. Machado*, 6 C. & P. 218, E. C. L. R. vol. 25; 3 Moore & S. 841, S. C.

(i) *Powell v. Monnier*, 1 Atk. 614; *Wynne v. Raikes*, 5 East, 514.

(1) A parol acceptance will bind the acceptor. *Leonard v. Mason*, 1 Wendell, 522; *Williams v. Winans*, 2 Green, 339; *Walker v. Lide*, 1 Richardson, 249; *Ward v. Allen*, 2 Metcalfe, 53.

A drawer of a bill of exchange may charge himself as acceptor by writing his name over the face of the bill. *Spear v. Pratt*, 2 Hill, 582.

There is no rule requiring that the bill should be actually shown to the drawee in order to a valid and binding acceptance; it is enough if when applied to for acceptance, he is enabled, by seeing the bill or otherwise, to give an intelligent answer. *Fisher v. Beckwith*, 19 Vermont, 31.

The drawee of an order for a seaman's share of the proceeds of a whaling voyage declined to accept it, but took the bill and promised to try to save the amount for the payee, if the drawer consented. The drawer on his return refused to assent. Held, that the bill had not been accepted. *Parkhurst v. Dickerson*, 21 Pickering, 307. A promise to "accord a credit" for £3000 on the usual terms and conditions, which were to accept bills at ninety days' sight, was held not to amount to an acceptance. *Carniger v. Morrison*, 2 Metcalfe, 381. A verbal promise to pay a bill accompanied by a refusal to accept it, is no acceptance, though the drawer have funds in his hands. *Luff v. Pope*, 5 Hill, 413.

Where an order was presented for acceptance, and the drawee refused to accept, but promised to pay the person in whose favor it was drawn by a given day, it was held, that the latter could maintain no action against the drawee, though he had funds of the drawer in his hands at the time, and ought in justice to have accepted. *Pope v. Luff*, 7 Hill, 577.

indorsed.(*k*) Such a promise will enure to the benefit of the indorsee, and all other parties.

It cannot, therefore, be revoked by the drawee, though the party to whom it was given consent to the revocation, and though neither the indorsee nor any other party to the bill had notice of the acceptance.(*l*)

Where the drawee answered an application to accept the bill, by saying, "the bill should have attention," it was held that these words were ambiguous, and did not amount to an acceptance;(m) so, an answer by the drawee, "there is your bill, it is all right," is no acceptance.(n) The mere detention of a bill by the drawee will not, it seems, amount to an acceptance. "In support of this doctrine," says Abbott, C. J., "have been cited the opinions of some great and learned persons, entitled, undoubtedly, to the highest respect. It is not, however, supported by the authority of any decided case; for the cases have all been decided upon very special circumstances."(*o*) Drawee kept a bill drawn on him, which he was requested to accept and forward, a considerable time after he had been told by the payee that he should consider his detention of the bill as tantamount to an acceptance. He afterwards admitted that he had neglected to write an acceptance upon it, thinking it of no consequence, as he meant to pay it. Held, that under the circumstance, the detention amounted to an acceptance.(p) Where a bill, being presented and left for an acceptance, was refused acceptance by the drawee, but remained afterwards for a considerable time in his hands, and was ultimately destroyed by him, held by three Judges (*dissentiente* Lord Ellenborough, C. J.), that the drawee was not thereby liable as the acceptor of the bill.(q) But, if the drawee had previously refused acceptance,

(*k*) *Fairlee v. Herring*, 3 Bing. 625, E. C. L. R. vol. 11; *Grant v. Hunt*, 14 L. J. 106, C. P., and 1 C. B. Rep. 44, E. C. L. R. vol. 50.

(*l*) *Grant v. Hunt*, *Ibid*.

(*m*) *Rees v. Warwick*, 2 B. & Ald. 113; 2 Stark. 111, E. C. L. R. vol. 3, S. C., unless by the course of dealings it has been usually considered such.

(*n*) *Powell v. Jones*, 1 Esp. 17. See *Anderson v. Hick*, 3 Camp. 179; *Anderson v. Heath*, 4 M. & Sel. 303.

(*o*) *Mason v. Barff*, 2 B. & Ald. 26.

(*p*) *Harvey v. Martin*, 1 Camp. 425; *Bayley*, 6th ed. 193; and see *Trimmer v. Oddie*, there cited.

(*q*) *Jeune v. Ward*, 1 B. & Al. 653; 2 Stark, 326, E. C. L. R. vol. 3, S. C.

then, it seems, destroying the bill would be such an act of *ownership as would amount to an acceptance.^(r) On the whole, it should seem that any conduct of the drawee, by which he intended the holder should understand that he meant to accept or pay, will amount to an acceptance of any existing foreign bill.^(s) A letter written by the drawee to the drawer may amount to an acceptance, though the drawer be dead, and the drawee unacquainted with the fact.^(t)

The holder is entitled to require from the drawer an absolute engagement to pay in money according to the tenor and effect of the bill, unencumbered with any condition or qualifications. A general acceptance, without any express words to restrain it, will be such an absolute acceptance.

If the drawee offer a qualified acceptance, the holder may either refuse or accept the offer. If he mean to refuse it, he may note the bill, and should give notice of the dishonor to the antecedent parties. If he intend to acquiesce in it, he must give notice of the nature of the acceptance to the previous parties, and, it should seem, must obtain their consent,^(u) or they will be discharged;^(v) but he must not protest or note the bill, or give a general notice of dishonor, for he

(r) *Jeune v. Ward*, 1 B. & AL. 663; 2 Stark. 326, E. C. L. R. vol. 3, S. C.

(s) *Billing v. Devaux*, 11 L. J. 38, C. P.; 3 M. & G. 565, E. C. L. R. vol. 42, S. C.

(t) *Ibid.*

(u). Perhaps it might not be necessary to obtain the consent to an acceptance for part of the amount.

It has been doubted whether an acceptance payable at a particular place, and not otherwise or elsewhere, can be safely taken without the consent of the prior parties since 1 & 2 Geo. 4, c. 78.

(v) *Chitty on Bills*, 9th ed. 300; *Marius*, 68, 85; and see the observations of Bayley, J., in *Sebag v. Abitol*, 4 M. & Sel. 462; 1 Stark. 79, E. C. L. R. vol. 2, S. C.; and the answers of the Judges to the third question put to them in *Rowe v. Young*, 2 B. & B. 244, E. C. L. R. vol. 6; 2 Bligh, R. 391, S. C.; *Outhwaite v. Luntley*, 4 Camp. 179. Acquiescence in an acceptance at a longer date destroys the remedy against the prior parties according to the Scotch law. *Glen*. 2d ed. 115. So it did according to the old French law. *Poth.* 49. The *Code de Commerce*, Art. 124, avoids conditional acceptances, but allows acceptances for part of the sum and acceptances varying in the place of payment. Art. 123. A varying acceptance, though void as to other parties, would be binding between the contracting parties. *Nouguier des Lettres de Change*, vol. 1, p. 234.

would thereby preclude himself from recovering against the acceptor. (*w*)

Qualified acceptances are of two kinds: *conditional* and *partial*, or *varying* from the tenor of the bill.

[*150] *Whether an acceptance be conditional or not, is a question of law. (*x*) Acceptances, "to pay as remitted for," (*y*) "to pay when in cash for the cargo of the ship *Thetis*," (*z*) "to pay when goods consigned to him (the drawee) were sold," (*a*) an answer, "that a bill would not be accepted till a Navy bill was paid," have respectively been held to be conditional acceptances. So where on the presentment of bills for acceptance, the drawee said he would have accepted them, if he had had certain funds which he had not been able to obtain from France, but that when he did obtain them he would pay the bill, this was held to amount to a conditional acceptance. (*b*) When the acceptance is in writing, and absolute, it may be suspended on a condition by another contemporaneous writing. (*c*)

But a mere verbal condition (at least, if contemporaneous with the acceptance) is inadmissible in evidence to qualify the absolute written engagement, even between the original parties. "This would be," says Lord Ellenborough, "incorporating with a written contract an incongruous parol condition, which is contrary to first principles." (*d*) (1) And though the condition be *written* on distinct paper, it cannot be available against an indorsee ignorant of the existence of such a paper. (*e*)

(*w*) *Sproat v. Matthews*, 1 T. R. 182; *Bentinck v. Dorrien*, 6 East, 200; 2 Smith, 336, S. C.; Chit. 9th ed. 301.

(*x*) *Sproat v. Matthews*, 1 T. R. 182.

(*y*) *Banbury v. Lissett*, 2 Stra. 1211.

(*z*) *Julian v. Shobrooke*, 2 Wils. 9.

(*a*) *Smith v. Abbot*, 2 Stra. 1152.

(*b*) *Mendizabal v. Machado*, 6 C. & P. 218, E. C. L. R. vol. 25; 3 M. & Scott, 841, S. C.

(*c*) *Bowerbank v. Monteiro*, 4 Taunt. 844; but see 1 & 2 Geo. 4, c. 78, s. 2; and see *Spiller v. Westlake*, 2 B. & Ad. 157, E. C. L. R. vol. 22; *Gibbon v. Scott*, 2 Stark. 286, E. C. L. R. vol. 3.

(*d*) *Hoare v. Graham*, 3 Camp. 57; *Adams v. Wordley*, 1 M. & W. 374; * 2 Gale, 29, S. C.

(*e*) *Bowerbank v. Monteiro*, 4 Taunt. 844. See Chapter VII, on *Irregular Instruments*.

(1) An acceptance of a bill is an absolute contract to pay, and it cannot therefore be shown by parol that it was not absolute. *Haverin v. Donnell*, 7 Smedes and Marshall, 244.

Though, when the condition is performed, a conditional acceptance becomes absolute, yet in pleading, it must be declared on as a conditional acceptance, with an averment that the condition has been fulfilled.(f)(1)

A partial or varying acceptance varies from the tenor of the bill, as where it engages to pay part of the sum. Drawee accepted a foreign bill for 127*l.* 18*s.* 4*d.*, as far as 100*l.* part thereof: he was sued on the acceptance, and it was held good, *pro tanto*, within the custom of merchants.(g) Or, to pay at a different time from that at which the bill is made payable by the drawer.(h) A bill was accepted in this form, "Accepted *on the condition of its being *renewed*, [*151] till 28th Nov. 1844." This was held to be a varying acceptance on which the holder might insist against the acceptor, and that the word *renewed* might be read to mean an extension of the time when the bill was to become payable.(i)

(f) *Langston v. Corney*, 4 Camp. 176; 1 Marsh. 176; D. & R. N. P. C. 33; *Ralli v. Sarrell*, 1 D. & R. N. P. C. 33, E. C. L. R. vol. 16; see a form. *Swann v. Cox*, 1 Marsh. 176.

(g) *Wegersloff v. Keene*, 1 Stra. 214.

(h) *Molloy*, 283; *Walker v. Atwood*, 11 Mod. 190. In this case the acceptance was held good within the custom of merchants; but the case is no authority to show that the prior parties would not be discharged if such an acceptance were taken without their consent.

(i) *Russell v. Phillips*, 19 L. J. 297, Q. B.

(1) If a bill is accepted "to be paid when in funds," and the payee does not except to such acceptance, he cannot resort to the drawer till the acceptor refuses to pay, after he has funds. *Andrews v. Baggs*, Minor, 173; *Campbell v. Pettengill*, 7 Greenl. 126; see *Knox v. Reeside*, 1 Miles, 294; *Gallery v. Prindle*, 14 Barbour, 186.

Where one accepts an order payable out of a certain note, when collected, but dies before the money is collected, and it is afterwards received by his personal representatives, they are liable in their representative character upon the contract of their testator. *Swansey v. Breck*, 10 Alabama, 533.

The addition of the word "administrator" to the name of the acceptor of a bill of exchange, does not qualify his liability or make his acceptance a conditional one. *Tassey v. Church*, 4 Watts & Sergeant, 346.

When a factor accepts a planter's order payable "when in funds," it amounts to a promise to pay out of the first funds of the planter, which shall come into his hands, deducting the necessary advances for plantation expenses; and he cannot defend himself against an action on the acceptance by showing, that he has never been in funds over and above the amount of a debt due him by the planter at the time of the acceptance. *Hunter v. Ingraham*, 1 Strobhart, 271.

Before the 1 & 2 Geo. 4, c. 78, it was a point much disputed, whether, if a bill payable generally was accepted payable at a particular place, such an acceptance was a qualified one. That statute, however, has now settled, that an acceptance, payable at a banker's, or other particular place, is *as against the acceptor*, a general acceptance, unless the acceptor express, in his acceptance, that the bill is payable there only,^(j) and not otherwise or elsewhere.^(k)(1)

If the customer of a banker accept a bill, and make it payable at his bankers, that is of itself a sufficient authority to the bankers to apply the customer's funds in paying the bill.^(l)

As to the manner in which a bill drawn or accepted payable at a particular place, should be presented for payment, and as to the form of pleading, see the next Chapter on PRESENTMENT FOR PAYMENT.

Although as we have seen there cannot be two acceptances on the same bill, except for honor,^(m) yet if such a second acceptance be on the bill, it may amount to a guarantee.⁽ⁿ⁾

If the drawer of a foreign bill, drawn in sets, accept both sets, and they are afterwards in the hands of two different holders, he may become liable to each.^(o)

The liability of the acceptor, though irrevocable when complete,^(p) [*152] does not attach by merely writing his name, but *upon the subsequent delivery of the bill, or upon communication to some

(j) An acceptance omitting the word *only*, and stating the bill to be payable at a particular place, and not elsewhere, is a special acceptance. *Siggers v. Nichols*, Q. B., H. T. 1839; 3 Jurist, 34, S. C.

(k) It will be observed, that this part of the statute applies to all bills, foreign as well as inland.

(l) *Keymer v. Laurie*, 18 L. J. 218, Q. B.

(m) As to which see *Acceptance*, supra, *Protest*.

(n) *Jackson v. Hudson*, 2 Camp. 447.

(o) See *Holdsworth v. Hunter*, 10 B. & C. 451, E. C. L. R. vol. 21; *Perreira v. Jopp*, *Ibid*.

(p) *Thornton v. Dick*, 4 Esp. 270; *Trimmer v. Oddie*, Bayley, 6th ed. 204.

(1) When the drawee of a bill accepts payable at a particular place, he is considered the principal debtor, and a suit, as in other cases of a precedent debt or duty, is a sufficient demand; it will be a good defence, however, to show that he was at the place ready to pay according to the acceptance. *Green v. Goings*, 7 Barbour, Sup. Ct. 652.

When the drawee of a bill payable at sight, accepted it "if it be presented at a particular time," he will be liable on it, although not presented at that time. *Clarke v. Gordon*, 3 Richardson, 311.

person interested in the bill, that it has been so accepted. "La raison est," says Pothier, "que le concours de volontés, qui forme un contrat, est un concours de volontés que les parties se sont réciproquement déclarés; sans cela la volonté d'une partie ne peut acquérir de droit à l'autre partie, ni par conséquent être irrévocable. Suivant ces principes pour que le contrat entre le propriétaire de la lettre, et celui sur qui elle est tirée soit parfait, il ne suffit pas que celui-ci ait eu pendant quelque temps la volonté d'accepter la lettre, et qu'il ait écrit au bas qu'il l'acceptait; tant qu'il n'a pas déclaré cette volonté, le contrat n'est pas parfait; il peut changer de volonté et rayer son acceptation."

Hence it follows, that if the drawee has written his name on the bill, with the intention to accept, he is at liberty to cancel his acceptance at any time before the bill is delivered, or at least before the fact of acceptance is communicated to the holder.(q)

If a banker, with whom a bill is made payable by the acceptor, cancel the acceptance by mistake, without any want of due care, and return the bill so defaced, refusing to pay it, he does not thereby necessarily incur any legal liability.(r) But if the banker, in so doing, be guilty of want of due care, an action lies against him at the suit of the holder, for the special damage actually sustained by the cancellation of the bill. Where an acceptance has been cancelled by mistake, it is the usage in the city of London to return the bill with the words "cancelled by mistake" written on it. The proper and safer mode of cancelling is to draw the pen through the name, so as to leave it legible.(s)

And upon the same principle it has been held that a cancellation of the acceptance by mistake made by other parties does not destroy the bill.(t)

The acceptor is now considered, in all cases, as the party primarily

(q) *Cox v. Troy*, 5 B. & Ald. 474, E. C. L. R. vol. 7; 1 D. & R. 38, S. C.; see *Bentinck v. Dorrien*, 6 East, 199; 2 Smith, 337, S. C.; *Marius*, 20.

(r) *Novelli v. Rossi*, 2 B. & Ad. 757, E. C. L. R. vol. 22; *Warwick v. Rogers*, 5 Man. & G. 340, E. C. L. R. vol. 44.

(s) See the observations of Abbott, C. J., in *Wilkinson v. Johnson*, 3 B. & C. 428, E. C. L. R. vol. 10.

(t) *Raper v. Birkbeck*, 15 East, 17; quære, as to the effect of the decision in *Davidson v. Cooper*, 11 M. & W. 778,* on some cases of cancellation.

[*153] liable on the bill. He is to be treated as the principal *debtor to the holder, and the other parties as sureties liable on his default.(u) The acceptor of a bill stands for most purposes, in the same situation as the maker of a note, and therefore most of the following observations will apply to the latter also.(1)

(u) *Fentum v. Pocock*, 5 Taunt. 192, E. C. L. R. vol. 1; 1 Marsh. 14, E. C. L. R. vol. 4, S. C.

(1) The presumption is that the acceptor of a bill of exchange has funds of the drawer in his hands to meet it; and the possession of such accepted bill by the drawers is sufficient to entitle them to recover the amount of the acceptor; and it makes no difference that the drawers took up the bill by giving a new note. *Byrne v. Schwing*, 6 B. Monroe, 199.

An acceptance is an admission that the acceptor has funds of the drawer. *Jordan v. Tarkingdon*, 4 Devereux, 358; *Raborg v. Peyton*, 2 Wheat. 385; *Kendall v. Galvin*, 3 Shepley, 131; *Kemble v. Lull*, 3 McLean, 272; *Byrd v. Bertrand*, 2 English, 321.

An acceptance of a bill is not a collateral engagement to pay another's debt, and is therefore not within the statute of frauds; and when made without conditions, it is an absolute engagement to pay the money to the holder. *Raborg v. Peyton*, 2 Wheaton, 385; *Storer v. Logan*, 9 Mass. 60.

The acceptor of a bill is the principal debtor; he cannot assume the attitude of a surety, though only an accommodation acceptor, and the equitable doctrine respecting sureties does not apply to him; and if it did it would not avail him in a suit at law upon a written acceptance, for which by the law merchant there is a sufficient consideration implied. *Anderson v. Anderson*, 4 Dana, 352.

An accommodation acceptor of a bill of exchange is a surety as to the drawer, but a principal as to the holder, although the holder knew him to be an accommodation acceptor. *In re Babcock*, 3 Story, 393.

An acceptance of a bill by parol is not void for want of consideration, when it appears that there was then a debt due from the acceptor to the drawer, on account of which the bill was drawn. *Fisher v. Beckwith*, 19 Vermont, 31; *Walker v. Sherman*, 11 Metcalf, 170.

The acceptor cannot defend against the payee, on the ground that the acceptance was without consideration (an accommodation acceptance), and so known to the payee. *Grant v. Ellicott*, 7 Wendell, 227; *Towsley v. Sumrall*, 2 Peters, 183; *Warder v. Tucker*, 7 Mass. 452.

To entitle the holder of a bill to recover the amount of one who accepted without consideration, he must be an innocent bona fide holder for value in the usual course of business without notice. *Boggs v. Lancaster Bank*, 7 Watts & Sergeant, 331. But this case does not show that the burden of proving this is in the first instance on the holder, or that proof of the fact, that the defendant was an accommodation acceptor, is enough to cast the burden on him.

The mere acceptance of a draft does not give the acceptor a right of action against the drawer. *Suydam v. Coombs*, 3 Green, 133.

Where the drawer has paid the bill to the payees, after the acceptors have refused

The acceptor's liability can only be discharged by payment, or other satisfaction, by release, or by waiver.

Payment, satisfaction, and release, we shall consider hereafter.

It is a general rule of law, that a simple contract may, *before breach*, be waived or discharged, without a deed and without consideration; but after breach, there can be no discharge, except by deed, or upon sufficient consideration.^(v) To this rule, it is said, that contracts on bills, which are regulated by the custom of merchants, form an exception, and that the liability of the acceptor, though complete, may be discharged by an express renunciation of his claim, on the part of the holder. Joint indorsees against acceptors;—It was proved that the plaintiffs knew the acceptance was for the accommodation of the drawer, and that they had said, at a meeting of the defendants' creditors, "that they looked to the drawer, and should not come upon the acceptors." They had at this time goods of the drawer in their hands, which afterwards turned out of little value. Lord Ellenborough directed the jury to consider, "whether the language employed by the plaintiffs amounted to an absolute unconditional renunciation by them, as holders of the bill, of all claims in respect of it upon the defendants, as acceptors. In that case, the acceptors were discharged from their liability: the holders had made their election, and could now only proceed against the drawer. On the other hand, if the words only imported that they looked to the drawer in the first instance, that it was not then necessary to come upon the acceptors, and that they should not resort to them, if satisfaction could be obtained in another quarter, they did not waive their remedy by this conditional promise, and the acceptors still continued liable until the bill should be actually paid."^(w) Receiving interest from the drawer will not discharge the acceptor. Nothing short of

(v) Com. Dig. Action on the Case in Assumpsit, G.; *Fitch v. Sutton*, 5 East, 230.

(w) *Whatley v. Tricker*, 1 Camp. 35.

to pay it, he has the right to sue the acceptors, in the name of the payee, for his own benefit. *Davis v. McConnell*, 3 McLean, 391.

If the acceptor of a bill of exchange, after it has come to his hands, put it again in circulation, he admits it to be a subsisting bill, and cannot be allowed to allege in an action against him, that it was paid before that time. *Hinton v. Bank of Columbus*, 9 Porter, 463.

[*154] an express discharge will do.(x) If the renunciation *be not express, and for the whole amount, there must be a consideration.(y)(1)

The cancellation of the acceptor's name by the holder is a waiver of the acceptance. Where a third person cancels, it is a question for the jury whether that cancellation were with the assent of the holder.(z)

The liability of the acceptor, as such, will also be waived or extinguished, by taking from him a coextensive security by specialty. But, if the new security recognize the bill or note as still existing, it is not extinguished.(a) Where one of three partners, after a

(x) *Dingwall v. Dunster*, Doug. 235; and *Black v. Peel*, and *Walpole v. Pulteney*, there cited; *Anderson v. Cleveland*, 13 East, 430, n.; *Farquhar v. Southey*, M. & M. 14; 2 C. & P. 427, E. C. L. R. vol. 12, S. C.; *Adams v. Gregg*, 2 Stark. 531, E. C. L. R. vol. 3; *Stevens v. Thacker*, Peake, 187. So it has been held, that a right to sue the drawer may be waived. *Delatorre v. Barclay*, 1 Stark. 7, E. C. L. R. vol. 2; see *Cartwright v. Williams*, 2 Stark, 340, E. C. L. R. vol. 3; ante, *Adams v. Gregg*, 2 Stark. 531, E. C. L. R. vol. 3; see *Story on Bills*, s. 252; see also *Steel v. Harmer*, 15 L. J. 217, Ex.; 14 M. & W. 831,* S. C., and 19 L. J., Exch. 34, in error. As to pleading a waiver, see *Steele v. Benham*, 3 D. & L. 506.

(y) *Parker v. Leigh*, 2 Stark. 228, E. C. L. R. vol. 3.

(z) *Sweeting v. Halse*, 9 B. & C. 365, E. C. L. R. vol. 17; 4 M. & R. 287, S. C.

(a) *Twopenny v. Young*, 3 B. & C. 208, E. C. L. R. vol. 10; 5 D. & R. 259, E. C. L. R. vol. 16, S. C.

(1) Judge Story has not laid down the law so broadly as it is assumed in the text. He says: "Where the renunciation is clear, and the intention to discharge unquestionable, there, if there be a sufficient consideration, or an act done on the part of the acceptor, which might not otherwise have been done, which affects his interest, the acceptor will be discharged." *Story on Bills*, s. 266. There can be no hesitation in assenting to this statement of the law. But there is nothing peculiar in this doctrine to bills of exchange. It is the application only of principles well settled in all other classes of contract. It is to be observed also, that bills or notes are not within the rule that simple contracts may be discharged by parol before breach; it would be more accurately expressed, to say that executory contracts may be discharged or varied by parol before breach, and then I am not aware of any principle or cases, which would confine it to simple contracts. If A. agrees to build a house for B., or to sell him certain materials, whether by articles under seal or not, A. and B. may before breach vary such agreement by parol. But if the consideration on either side is executed, or just so far as it is executed, it is no longer an executory but an executed contract, and an accord without satisfaction is no bar. A bond, a bill, a note, the price to be paid for making a coat, building a house, or selling a barrel of flour, if the service has been performed, or the merchandize delivered, though a credit is given, are *debita in presenti, solvenda in futuro*, and cannot be released, unless by an instrument under seal, or an agreement founded upon sufficient consideration.

dissolution of partnership, undertook by deed made between the partners, to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly preserving his right against all three, and retained possession of the original bills, it was held that, the separate notes having proved unproductive, he might still resort to his remedy against the other partners, and that the taking, under these circumstances, the separate notes, and even afterwards renewing them several times successively, did not amount to satisfaction of the joint debt.^(b) But, in general, the taking a separate bill of one of two joint acceptors of a former bill is a relinquishment of all claim on the former security.^(c)

A plea of waiver must state that the party waiving was the holder of the bill at the time of the waiver.^(d)

By acceptance, the drawee admits the signature and capacity of *the drawer, and cannot, after thus giving the bill currency, [*155] be admitted to prove that the drawer's signature was forged.^(e)(1) He moreover admits, and so does the maker of a promissory note, the then capacity of the payee, to whose order the bill or note is made payable, to indorse. Hence the acceptor is estopped from saying that payee being a bankrupt could not indorse,^(f) and even from saying that a second bankruptcy before the acceptance precluded him from indorsing, though the effect of such second bankruptcy be^(g) to vest, ipso facto, all the bankrupt's property in his

(b) *Bedford v. Deakin*, 2 B. & Ald. 210; 2 Stark. 178, E. C. L. R. vol. 3; S. C.

(c) *Evans v. Drummond*, 4 Esp. 89; *Reed v. White*, 5 Esp. 122; *Thompson v. Percival*, 5 B. & Ad. 925, E. C. L. R. vol. 27; 3 N. & M. 667, S. C.

(d) *Steele v. Harmer*, 15 L. J. Ex. 217; 14 M. & W. 136,* S. C. As to this point, affirmed in error, 19 L. J. Ex. 34.

(e) *Price v. Neal*, 3 Burr. 1354; 1 Bla. R. 390, S. C.; *Porthouse v. Parker*, 1 Camp. 82; *Prince v. Brunatte*, 1 Bing. N. C. 435, E. C. L. R. vol. 27; 1 Scott, 342; 3 Dowl. 382, S. C.; *Wilkinson v. Lutwidge*, 1 Stra. 648; *Jenys v. Fowler*, 2 Stra. 946; and see *Bass v. Clive*, 4 M. & Sel. 13; 4 Camp. 78, S. C.

(f) *Drayton v. Dale*, 2 B. & C. 293, E. C. L. R. vol. 9; 3 D. & Ry. 534, S. C.; *Braithwaite v. Gardiner*, 8 Q. B. Rep. 473, E. C. L. R. vol. 55.

(g) 6 Geo. 4, c. 16, s. 127.

(1) An acceptor is bound to know the drawer's handwriting, and cannot resist payment to a bona fide holder, though the bill be a forgery. *Bank of United States v. Bank of Georgia*, 10 Wheaton, 333; *Levy v. Bank of the United States*, 1 Binney, 27; S. C. 4 Dallas, 234.

assignees. *(h)* Neither can the acceptor be allowed to defeat the indorsement by setting up the infancy of the payee. *(i)* Nor can the acceptor plead that the drawer to whose order the bill was made payable, being a corporation, had no authority to indorse; *(k)* nor that the drawer was a married woman, although as the husband may sue or indorse, the consequence may be that the acceptor may possibly be compelled to pay the bill twice. *(l)* But the acceptance of a bill drawn and indorsed in the name of a really existing person is no admission of the handwriting of the indorser, *(m)* unless at the time of the acceptance the drawee knew of the forgery, and intended that the bill should be put into circulation by a forged indorsement. *(n)* And the acceptance of a bill purporting to be already indorsed by the payee, is no admission of the genuineness of the indorsement. *(o)* So where the drawing is by procuration, the authority of the agent to draw is admitted, but not his authority to indorse. *(p)* But where the bill is drawn in a *fictitious name*, the acceptor undertakes to pay to an indorsement by the same hand. *(q)*

[*156] *If the drawee has once admitted that the acceptance is in his own handwriting, and thereby given currency to the bill, he cannot afterwards exonerate himself by showing that it was forged. *(r)*(1)

(h) Pitt v. Chappelow, 8 M. & W. 616.*

(i) Taylor v. Croker, 4 Esp. 187; Jones v. Darch, 4 Price, 300.

(k) Halifax v. Lyle, 18 L. J. 197, Exch.; 3 Ex. Rep. 446,* S. C.

(l) Smith v. Marsack, 18 L. J. 68, C. P.; 6 C. B. Rep. 486, E. C. L. R. vol. 60.

(m) Smith v. Chester, 1 T. R. 655; Carrick v. Vickery, Doug. 2d ed. 653, n. 134.

(n) Beeman v. Duck, 11 M. & W. 251.*

(o) Tucker v. Robarts, 18 L. J. 169, Q. B.

(p) Robinson v. Yarrow, 7 Taunt. 455, E. C. L. R. vol. 2; 1 Moore, 150, S. C.

(q) Cooper v. Meyer, 10 B. & C. 468, E. C. L. R. vol. 21; 5 M. & R. 387, S. C.; Beeman v. Duck, 11 M. & W. 251;* and see Taylor, 4 Esp. 187; Bass v. Clive, 4 M. & Sel. 13; 4 Camp. 78, S. C. It seems that a bill drawn and indorsed in a fictitious or forged name, to the knowledge of the drawer, should be declared on as payable to bearer. See ante, p. 61, note, and Beeman v. Duck, 11 M. & W. 251.*

(r) Leech v. Buchanan, 4 Esp. 226.

(1) Where the maker of a note draws it payable to a real person and forges his indorsement, and puts the note into circulation, in an action by a bona fide holder against the maker, proof of the indorsement is unnecessary; the maker will be estopped from saying that it is not genuine. Meacher v. Fort, 3 Hill (South Carolina), 227.

A party indorsing a promissory note impliedly affirms its genuineness, as well as that of all previous indorsements; and though his indorsee in declaring against him,

*CHAPTER XVI.

[*157]

ON PRESENTMENT FOR PAYMENT.

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A PERSONAL demand on the drawee or acceptor is not necessary. It is sufficient if payment be demanded at his usual residence or place

may, in usual form, allege the making of the note and its indorsement to the defend-
ant, yet he cannot be required to prove it. Woodward v. Harbin, 1 Alabama, 104.

If the maker of a note makes it payable to a fictitious person and puts it in cir-
culation with the fictitious name written on it, or if he makes it payable to a real
person and forges his indorsement or procures it to be done, and then puts it in cir-
culation, he is estopped to say that it is not genuine. Fort v. Meacher, Riley, 248.

A note payable to the order of a real person, and indorsed in a handwriting resem-
bling and intended to pass for his, cannot be considered as payable to a fictitious
payee, and so negotiable without being indorsed. Dana v. Underwood, 19 Pick. 99.

A paper purporting to be a bill of exchange, having a blank for the payee's name,
may be filled up at any time by a bona fide holder; but until it is so filled up, a
suit will not lie on it against the acceptor. Greenhow v. Boyle, 7 Blackford, 56.

of business, of his wife or other agent; for it is the duty of an acceptor, if he is not himself present, to leave provision for the payment.(a)(1) And it is sufficient if *payment be demanded of [*158] an agent who has been authorized to pay, or has usually paid bills for the drawee. Thus, where a country bank note was made payable both at Tunbridge and in London, presentment in London was held sufficient, though it was proved that, had it been presented at Tunbridge, the nearest place, it would have been paid.(b)

The bankruptcy or insolvency of the drawee is no excuse for a neglect to present for payment; for many means may remain of obtaining payment, by the assistance of friends or otherwise.(c) It has been held in the King's Bench, that the shutting up of a bank, when any demand there made would have been inaudible, is substantially a

(a) *Matthews v. Haydon*, 2 Esp. 509; *Brown v. M'Dermot*, 5 Esp. 265. If the bill be payable at a particular place, see post.

(b) *Beeching v. Gower*, Holt, N. P. C. 313.

(c) *Russell v. Langstaffe*, Doug. 496; *Warrington v. Furber*, 8 East, 245; *Nicholson v. Gouthit*, 2 H. Bla. 609; *Ex parte Johnstone*, 1 Mont. & Ayr. 622; 3 Deac. & Chitty, 433, S. C.; *Esdale v. Sowerby*, 11 East, 114; *Lafitte v. Slatter*, 6 Bing. 623, E. C. L. R. vol. 19; 4 M. & P. 457, S. C.; *Camidge v. Allenby*, 6 B. & C. 373, E. C. L. R. vol. 13; 9 D. & R. 391.

(1) A demand by a notary in the street, upon the acceptor of a bill payable generally, is not a sufficient demand. It should be made at his place of business. *King v. Holmes*, 11 Penna. State Rep. 465. The general rule is, that where a bill is accepted by partners, the presentment for payment should be at their place of business, or at the dwelling-house of either of them. And if a draft is addressed to the acceptors at a particular place, that will be presumed to be their place of business. *The Otsego County Bank v. Weaver*, 18 Barbour, S. C. Rep. 290.

When demand is made the bill itself must be exhibited. *Freeman v. Boynton*, 7 Mass. 483; *Masson v. Lake*, 4 Howard, U. S. Rep. 262; *Draper v. Clemens*, 4 Missouri, 52. See *Posey v. Decatur Bank*, 12 Alabama, 802; *Bank of Vergennes v. Cameron*, 7 Barbour, Sup. Ct. 143; *Whitwell v. Johnson*, 17 Mass. 499; *Smith v. Gibbs*, 2 Smedes & Marshall, 479; *Nailor v. Bowie*, 3 Maryland, 251.

A demand of payment of a lost note, or presentment of a copy is sufficient, and satisfies the usual averment of due presentment. *Hinsdale v. Miles*, 5 Conn. 331.

It is sufficient to constitute a demand and refusal to pay a note that the maker, on the day it becomes due, calls on the holder at his store where the note is, and informs him that he cannot and shall not pay it, and desires him to give notice to the indorser, though the note is not produced. *Gilbert v. Dennis*, 3 Mete. 495.

A notice sent the maker of a note through the post office, where his residence is known, that his note is overdue and unpaid, is not a sufficient demand to charge the indorser. *Stuckert v. Anderson*, 3 Wharton, 116.

refusal by the bankers to pay their notes, to all the world.(d) But it was decided in the same case, on error in the Exchequer Chamber, that an allegation in the declaration, that the makers became insolvent, and ceased, and wholly declined, and refused, then and thenceforth to pay, at the place specified, any of their notes, is insufficient, not being equivalent to an allegation of presentment.(e) But it is conceived, notwithstanding the observations of the Court in the last case, that it cannot be necessary for the holders of the notes of a bank, which has notoriously stopped payment, and is shut up, to go through the empty form of carrying their notes up to the bank doors, and then carrying them home again.(f)

A presentment for payment is now decided not to be necessary in order to charge a man, who guarantees the due payment of a bill or note.(g) And it had before been held that where a party was a guarantee for the vendee of goods, who has accepted a bill for the amount, and then became bankrupt, the notorious insolvency of the vendee was sufficient so far to excuse the drawer as to enable him to charge the guarantee, unless it could have been shown that the bill would have *been paid if duly presented, though it would have [*159] been otherwise in an action on the bill.(h)

If the drawee has shut up his house, the holder must inquire after him, and attempt to find him out.(1)

(d) *Howe v. Bowes*, 16 East, 112.

(e) 5 Taunt. 30, E. C. L. R. vol. 1, S. C. in error.

(f) Since the above observations were written, I observe that the point has been so ruled at Nisi Prius, and afterwards at Chambers. See *Henderson v. Appleton*, Chitty, 9th ed. 356, and *Rogers v. Langford*, 1 C. & M. 637,* where Lord Lyndhurst says: "It is possible, if you had returned the notes in due time, that might have done instead of presentment." See also *Turner v. Stones*, 1 Dow. & L. 122; *Sands v. Clarke*, 19 L. J. 84, C. P.; *Main's case*, 5 Rep. 21, a.; *Robson v. Oliver*, 10 Q. B. Rep. 704, E. C. L. R. vol. 59.

(g) *Hitchcock v. Humfrey*, 5 M. & G. 559, E. C. L. R. vol. 44; *Walton v. Mascall*, 13 M. & W. 453.*

(h) *Warrington v. Furber*, 8 East, 242; 6 Esp. 89, S. C.

(1) Want of demand is excused when the drawee cannot be found. *Stewart v. Eden*, 2 Caines, 121; *Galpin v. Hard*, 3 McCord, 394; *Porter v. Judson*, 1 Gray, 175.

Where the dwelling-house or place of business of the drawee of the bill is shut up, inquiry should be made in the neighborhood in order to excuse presentment. *Ellis v. Commercial Bank*, 7 Howard, Miss. 294.

Where the maker of a promissory note has absconded from his usual place of residence before the time of payment, it is not necessary to prove an inquiry for

If the drawee be dead, presentment must be made to his personal representatives; and, if he have none, then at his house.(i)(1)

If the holder die, presentment should be made by his personal representatives.

In treating of time *when* presentment is to be made, it will be necessary to consider, first, how, on the various sorts of bills, time is computed, and then on what bills, and to what extent, days of grace are allowed.

In acts of Parliament, in deeds, in other contracts and written instruments, and in legal proceedings, the word *month* is taken to mean a lunar, and not a calendar month, unless there be something in the context to indicate the latter sense;(k) but in matters eccle-

(i) Chitty, 9th ed. 357.

(k) *Lang v. Gale*, 1 M. & Sel. 111; *Barksdale v. Morgan*, 4 Mod. 185; *Jocelyn v. Hawkins*, 1 Stra. 446, which, however, seems overruled by *Titus v. Lady Preston*, 1 Stra. 652. In a contract for purchase of lands, months are said to be *prima facie* calendar months. *Hipwell v. Knight*, 1 Young & C. 401;* and see *Webb v. Fairman*, 3 Mees. & W. 474;* see 1 Sug. Vend. & Pur. 402. The meaning of the word "month" in a charter party has been left as a question for the jury. *Jolly v. Young*, 1 Esp. 186; *Reg. v. Chawton*, 1 Q. B. Rep. 247, E. C. L. R. vol. 41; see the authorities fully collected in *Simpson v. Margitson*, 11 Q. B. Rep. 23, E. C. L. R. vol. 63, and 2 Ex. Rep. 116.*

him there, and an effort to obtain payment, in order to charge the indorser. *Lehman v. Jones*, 1 Watts & Serg. 126.

If the drawee of a bill remove from his usual place of residence to another in the same state or kingdom, the holder is bound, in order to charge the indorser, to use reasonable diligence in finding the latter, and if he succeed, present the bill for payment. *Reid v. Morrison*, 2 Watts & Serg. 401; See *Gilmore v. Spies*, 1 Barb. 158.

Where the maker of a promissory note abandons his business and residence, and removes into another state, before the maturity of the note, the holder, if it be not proved that he received the note after the maker's removal, is not bound, in order to charge the indorser, to demand payment of the maker in the state to which he has removed; but he is bound to demand payment at the maker's last residence or place of business within the state where he made the note, if he can find it by the use of due diligence. *Wheeler v. Field*, 6 Metc. 290.

(1) The death of the maker of a note, and the insolvency of his estate, do not dispense with the necessity of demand and notice in order to charge an indorser. *Johnson v. North*, 1 Bailey, 482; *Juniata Bank v. Hale*, 16 Serg. & Rawle, 159.

But, where the maker of a negotiable note is dead at the time of indorsement, no demand is necessary to charge the indorser. *Davis v. Francisco*, 11 Missouri, 572.

siastical, and by the custom of trade, in bills and notes, a month is deemed to be a calendar or solar month.^(l) The inequality in the length of the respective months may sometimes occasion a difficulty; but it is said to be a rule not to extend the time at which the bill falls due, beyond the month in which it would have fallen due, had that month been of the length of thirty-one days. Thus, if a bill at one month be drawn on the 31st of January, it will be due on the 28th of February, and, with the days of grace, payable on the 3d of March.^(m)

When a bill is drawn at a certain number of days after date or after sight, those days are reckoned exclusively of the day *on which the bill is drawn or accepted, and exclusively of the day [*160] on which it falls due.⁽ⁿ⁾

We have already observed, that on a *bill* the words “after sight” are equivalent to “after acceptance;” for sight must appear in a legal way. If a *note* be made payable at sight, it must be presented before action brought against the maker.^(o)

Usance is the period which, in early times, it was usual to appoint between different countries for the payment of bills.—When usance is a month, half usance is always fifteen days,^(p) notwithstanding the unequal length of the months. A usance between London, Aleppo, Altona, and Amsterdam, Antwerp, Brabant, Bruges, Flanders, Geneva, Germany, Hamburg, Holland, and the Netherlands, Lisle, Middleburgh, Paris, or Amsterdam, Rotterdam, and Rouen, is one calendar month; between London and the Spanish or Portuguese towns, two calendar months, between London and Genoa, Venice, or places in Italy, it is three calendar months.^(q)

It is said that all the countries with which the English are in the habit of negotiating bills, compute their time by the new style, with the single exception of Russia.^(r) In the case of bills drawn in a place using one style, and payable in a place using another, if drawn payable at a certain period after date, they fall due as they would

(l) Cockell v. Gray, 3 B. & B. 186, E. C. L. R. vol. 7.

(m) Marius, 75; Kyd, 4.

(n) So if a bill be drawn payable so many days after a certain event. Bayley on Bills, 6th ed. 245; Coleman v. Sayer, 1 Barnard, 303.

(o) Dixon v. Nuttall, 1 C. M. & R. 307; * 6 C. & P. 320, E. C. L. R. vol. 25, S. C.

(p) Marius, 93.

(q) Chitty, 9th ed. 371; Bayley, 203.

(r) Bayley, 201.

have done in the country in which they were drawn. Thus, a bill drawn Feb. 1, in London, on St. Petersburg, at one month, would be payable without the days of grace, on March 1, in our calendar; and, as it was drawn on Jan. 21, old style, it would fall due on Feb. 21, in the Russian calendar. But, if the bill were drawn payable at a certain day, or at a certain period after sight, the time must then be reckoned according to the style of the place on which it is drawn.(s)

Days of grace are so called, because they were formerly allowed the drawee as a favor; but the laws of commercial countries have long since recognized them as a right. The number of these days varies in different places. Mr. Kyd gives the following table, which, [*161] however, has been altered in *many places since his day, by the substitution of the French Code, and other circumstances:

“Great Britain, Ireland, Bergamo, and Vienna, three days.

“Frankfort,(t) out of the fair-time, four days.

“Leipsic, Naumburg, and Augsburg, five days.

“Venice,(u) Amsterdam,(v) Rotterdam,(v) Middleburg, Antwerp,(v) Cologne, Breslau, Nuremberg, and Portugal,(w) six days.

“Dantzic, Koningsberg, and France,(v) ten days.

“Hamburg and Stockholm, twelve days.

“Naples,(v) eight; Spain, fourteen;(x) Rome, fifteen; and Genoa, thirty days.

“Leghorn,(y) Milan, and some other places in Italy, no fixed number.

“Sundays and holidays are included in the respite days, at London, Naples,(v) Amsterdam,(v) Rotterdam,(v) Antwerp,(v) Middleburg, Dantzic, Koningsberg, and France;(v) but not at Venice, Cologne, Breslau, and Nuremberg. At Hamburg, the day on which the bill falls due makes one of the days of grace; but it is not so elsewhere.”

Three days of grace are allowed in North America, Berlin, and in Scotland.(z)

(s) Beawes, 444; Bayley, 202.

(t) *i. e.* on the Maine.

(u) Not including Sundays and holidays.

(v) Abolished by the French Code. “Les délais de grâce, de faveur, d’usage, ou d’habitude locale pour le paiement de lettres de change, sont abrogés.” Code de Commerce, liv. i, tit. 8, 135.

(w) Now in Lisbon and Oporto fifteen days on domestic, and six on foreign bills.

(x) But eight days of grace only are allowed on inland bills. At Cadiz only six days are allowed.

(y) Now none.

(z) See *Ferguson v. Douglas*, 6 Bro. P. C. 276.

At Rio de Janeiro, Bahia, and other parts of Brazil, fifteen days.

At St. Petersburg, ten days on bills after date, three days on bills at sight, ten days on bills received and presented after they are due.

At Trieste and Vienna, three days on bills after date.(a),

The three days grace allowed in this country are reckoned exclusive of the day on which the bill falls due, and inclusive of the last day of grace.

Where there are no days of grace, and the bill falls due on a Sunday, Christmas Day, Good Friday, public fast or thanksgiving day, or where the last of the three days of grace happens on such a day, the bill becomes payable on *the day preceding; and if not [*162] then paid, must be treated as dishonored.(b)

A presentment for payment before the expiration of the days of grace is premature, and will not enable the holder to charge the antecedent parties.(c)(1)

Days of grace are allowed on promissory notes, as well as on bills.(d) They are allowed, whether the bill or note be made payable on a certain event, or at a certain day,(e) or at a certain number of years, months, weeks, or days after date or after sight, or at usance, or by instalments.(f) But they are not allowed on bills or notes

(a) See Freese's Camp. Com. part 2.

(b) *Tassell v. Lewis*, 1 Ld. Raym. 743; 39 & 40 Geo. 3, c. 42; 7 & 8 Geo. 4, c. 15. "Si l'échéance d'une lettre de change est à un jour férié légal, elle est payable la veille." Code de Commerce, liv. 1, tit. 8, 134.

(c) *Wiffen v. Roberts*, 1 Esp. 261.

(d) *Brown v. Harraden*, 1 T. R. 148.

(e) *Ibid.*, and so held in America. *Griffin v. Goff*, 12 Johns. Rep. 423.

(f) *Oridge v. Sherborne*, 11 M. & W. 374; * *Carlon v. Kenealy*, 12 M. & W. 139.* If the whole be payable on default of payment of any one instalment, are three more days of grace to be allowed?

(1) In order to charge the drawer or indorser, demand must be made of the drawee on the last day of grace. *Piatt v. Eads*, 1 Blackford, 82; *Eldridge v. Rogers*, Minor, 392; *Bussard v. Levering*, 6 Wheat. 102; *Mitchell v. De Grand*, 1 Mason, 176; *Ontario Bank v. Petrie*, 3 Wendell, 456.

A demand may be made upon the acceptor on the third day of grace, and, upon refusal to pay, notice may be given to the indorser of the non-payment on the same day, and after such notice on the same day, suit may be immediately commenced against the indorser. *Manchester Bank v. Fellows*, 8 Foster, 302.

payable on demand.(g) Whether days of grace are allowed on bills payable *at sight*, seems yet undecided.(h) The weight of authority has been considered to incline in favor of such an allowance.(i)

If days of grace are to be allowed on bills drawn payable at sight, the time when they should be presented has already been considered, in the Chapter on PRESENTMENT FOR ACCEPTANCE. If not, then they stand on the same footing as bills payable indefinitely, and bills payable on demand.

We have already seen that the time which bills payable *after sight* have to run is computed from the date of the acceptance;(k) a note payable at a certain period after sight is payable at that period after presentment for sight.(l) So, if some time after a refusal to accept, a bill, payable after sight, be accepted *supra protest*, the time is calculated, not from the date of the exhibition of the bill to the drawee, but from the date of the acceptance, *supra protest*.(m)

[*163] *Bills and notes payable on demand, and checks, must be presented within a reasonable time.(1) What is a reasonable time seems to be a question of law.(n)(2) And such a decision is conformable with the principles of law. "Reasonable time," says Lord Coke, "shall be adjudged by the discretion of the justices before whom the cause dependeth; and so it is of reasonable fines, customs and services, upon the true state of the case depending before them:

(g) Bayley, 241; Chitty, 9th ed. 146.

(h) Beawes, 256; Kyd, 10; Bayley, 198; Dehors v. Harriott, 1 Show. 163; Coleman v. Sayer, Barn. Rep. 303; 2 Stra. 829, S. C.; Janson v. Thomas, Bayley, 6th ed. 241; 3 Doug. 421, E. C. L. R. vol. 26, S. C.; Dixon v. Nuttall, 1 C. M. & R. 307; * 6 C. & P. 320, E. C. L. R. vol. 25, S. C.

(i) Selw. N. P. 7th ed. 344.

(k) Campbell v. French, 6 T. R. 200; 2 H. Bla. 163, S. C.

(l) Sturdy v. Henderson, 4 B. & Ald. 592, E. C. L. R. vol. 6.

(m) Williams v. Germaine, 7 B. & C. 468, E. C. L. R. vol. 14; 1 M. & R. 394, S. C.

(n) Tindal v. Brown, 1 T. R. 168; Darbyshire v. Parker, 6 East, 3; 2 Smith, 195, S. C.; Parker v. Gordon, 7 East, 385; 3 Smith, 358, S. C.; Haynes v. Birks, 3 Bos. & Pul. 599; Appleton v. Sweetapple, Bayley, 6th ed. 234; 3 Doug. 137, E. C. L. R. vol. 26, S. C.

(1) Lockwood v. Crawford, 18 Conn. 361; Carleton v. Bailey, 7 Foster, 230.

(2) See Lancaster Bank v. Woodward, 18 Penna. State. Rep. 362.

for reasonableness in these cases belongeth to the knowledge of the law, and therefore to be decided by the justices. *Quam longum esse debet non definitur in jure, sed pendet ex discretione justiciariorum.* And, this being said of time, the like may be said of things incertaine, which ought to be reasonable: for nothing that is contrary to reason is consonant to law.”(o) Besides, the opinions of jurors have been so various, that there can be no certainty on the subject, unless it be held to be a question of law. Yet we have seen, that what is a reasonable time within which to present for acceptance a bill drawn payable after sight, has been held a question of fact for the jury, and the same point has been ruled as to the time of presentment for payment of a note payable on demand.(p)

A man taking a bill or note payable on demand, or check, is not bound, laying aside all other business, to present or transmit it for payment the very first opportunity. It has long since been decided, in numerous cases, that, though the party by whom the bill or note is to be paid live in the same place, it is not necessary to present the instrument for payment till the morning next after the day on which it was received.(q) And later cases have established, that the holder of a check has the whole of the banking hours of the next day within which to present it for payment.(r)

Negotiable instruments, payable on demand, may be distributed into several classes, and the time within which they *ought to be presented for payment, and the consequences of a failure [*164] to make due presentment, are not precisely the same in every class.

Negotiable instruments payable on demand are common commercial bills of exchange, checks, common promissory notes, bank notes, and bankers' cash notes and bankers' bills.

(o) Co. Litt. 56, b.

(p) *Manwaring v. Harrison*, 1 Stra. 508; *Hankey v. Trotman*, 1 Bla. Rep. 1; see ante, p. 139, as to presentment for acceptance.

(q) *Ward v. Evans*, 2 Ld. Raym. 928; 6 Mod. 36, S. C.; *Moore v. Warren*, 1 Stra. 415; *Fletcher v. Sandys*, 2 Stra. 1248; *Turner v. Mead*, 1 Stra. 416; *Hoar v. Da Costa*, 2 Stra. 910; *Appleton v. Sweetapple*, Bayley, 6th ed. 234, 3 Dough. 137, S. C.

(r) *Pocklington v. Sylvester*, Chitty, 9th ed. 385; *Robson v. Bennett*, 2 Taunt. 388; *Rickford v. Ridge*, 2 Camp. 537; *Moule v. Brown*, 4 Bing. N. C. 266, E. C. L. R. vol. 33; 5 Sco. 694, S. C. As to checks, see ante, p. 14.

It is conceived that a common bill of exchange(s) payable on demand ought, if the parties live in the same place, to be presented the next day after the payee has received it. If the bill must be sent by post to be presented, it ought to be posted on the next day after the day on which it was received, and then the person who receives it by post, that he may present it, should do so on the day next following the day on which he receives it.

Such, also, are the general rules regulating the presentment of bankers' checks, which are really bills of exchange; but, as checks on bankers are now extremely common, it has been thought convenient to discuss the presentment of checks more in detail in the Chapter relating to checks.(t)

A common promissory note payable on demand differs from a bill payable on demand, or a check, in this respect: the bill and check are evidently intended to be presented and paid immediately, and the drawer may have good reasons for desiring to withdraw his funds from the control of the drawee without delay; but a common promissory note(u) payable on demand is very often originally intended as a continuing security, and afterwards indorsed as such. Indeed, it is not uncommon for the payee, and afterwards the indorsee, to receive from the maker interest periodically for many years on such a note. And sometimes the note is expressly made payable with interest, which clearly indicates the intention of the parties to be, that though the holder may demand payment immediately, yet he is not bound to do so. It is, therefore, conceived, that a common promissory note, payable on demand, especially if made payable with interest, is not necessarily to be presented the next day after it has been received, in order to charge the indorser; and that, when the indorser defends himself on the ground of delay in presenting the note, it will [*165] *be a question for the jury, whether, under all the circumstances, the delay of presentment was or was not unreasonable.

Bank notes and bankers' cash notes differ again from other promis-

(s) The rule may be otherwise in respect of paper intended for circulation and some descriptions of bankers' paper. *Shute v. Robins*, M. & M. 133; 3 C. & P. 80, E. C. L. R. vol. 14, S. C. Or where peculiar difficulties interpose. See *James v. Houlditch*, 9 D. & R. 40, E. C. L. R. vol. 22.

(t) Ante, p. 10.

(u) *Brooks v. Mitchell*, 9 M. & W. 15.*

sory notes in this, that they are intended to pass from hand to hand, and are issued that they may circulate as money, returning to the bank as seldom as possible; but they are not intended as a continuing security in the hands of any one holder. Therefore, a man who takes bank notes or bankers' cash notes in payment must present them,(v) or forward them for presentment, the day after he receives them, in order to enable him, in the event of the bank failing, to sue the persons from whom they were received on the consideration that was given for them.(w) But, as it would be inconsistent with the very nature and design of such notes, that every man who takes them should present them for payment, it is sufficient to exonerate the taker from the charge of laches, if he circulated them within the time within which he ought otherwise to have presented them.(x)

And without circulating them it should seem that, if according to the course of business it be usual to retain such notes a reasonable time, that may be an excuse for omitting instant presentment.(y) Moreover, the transmission of notes payable to bearer being attended with risk, the sender will, it seems, be allowed to cut the notes in halves, and send one set of halves on the next day, and one set the day after, or to send one set by coach and one by post.(z) And it may make a difference in the time allowed for presentment if the notes be received by a servant or agent.(a)

The same rules which govern the presentment and circulation of bank notes also apply to such bankers' paper as may be fairly considered part of the circulating medium of the country. Such are the bills of a country banker on his London correspondent.(b)

A bill or note on which no time of payment is specified, is payable on demand.(c)(1)

(v) Vide the Chapter on *Transfer*.

(w) *Camidge v. Allenby*, 6 B. & C. 373, E. C. L. R. vol. 13; 9 D. & R. 391, S. C.

(x) *Ibid.*; *Robinson v. Hawksford*, 15 L. J., Q. B. 377; 9 Q. B. 52, E. C. L. R. vol. 58, S. C.

(y) See *Shute v. Robins*, M. & M. 133; 3 Car. & P. 70, E. C. L. R. vol. 14, S. C.

(z) *Williams v. Smith*, 2 B. & Ald. 496.

(a) *James v. Houlditch*, 8 D. & R. 40, E. C. L. R. vol. 16.

(b) *Shute v. Robins*, M. & M. 133; 3 C. & P. 80, E. C. L. R. vol. 14, S. C.

(c) *Bayley*, 6th ed. 115; *Whitlock v. Underwood*, 2 B. & C. 157, E. C. L. R. vol. 9; 3 D. & R. 356, S. C.; and see the Chapter on the *Form of Bills*.

(1) *Green v. Drebilbis*, 1 G. Greene, 552.

[*166] *Presentment for payment should be made during the usual hours of business, and, if at a banker's, within banking hours. (d) If the party who is to pay the bill be not a banker, presentment may be made at any time of the day, when he may reasonably be expected to be found at his place of residence or business, though it be six, seven, or eight o'clock in the evening. (e) And even though there be no person within to return an answer. (f) Lord Tenterden, C. J. : "As to bankers, it is established, with reference to a well-known rule of trade, that a presentment, out of hours of business, is not sufficient; but, in other cases, the rule of law is, that the bill must be presented at a reasonable hour. A presentment at twelve o'clock at night, when a person had retired to rest, would be unreasonable; but I cannot say that a presentment between seven and eight in the evening is not a presentment at a reasonable time." (g) (1)

Where a bill or note was made or accepted, payable at a particular place, it was formerly a point much disputed, whether a presentment at that place was necessary, in order to charge the acceptor, maker, or other parties. At length, as we have already seen, it was decided in the House of Lords, that an acceptance, payable at a particular place, was a qualified acceptance, rendering it necessary in an action

(d) *Parker v. Gordon*, 7 East, 385; 5 Smith, 358, S. C.; *Elford v. Teed*, 1 M. & Sel. 28; *Jameson v. Swinton*, 2 Taunt. 224; *Whitaker v. Bank of England*, 1 C., M. & R. 744; * 6 C. & P. 700, E. C. L. R. vol. 25, S. C. In this case the bill had been presented at 11 A. M., and payment had been refused for want of assets; it was afterwards, on the same day, presented after banking hours, at 6 P. M., assets having in the meantime been received. It was intimated by Lord Abinger, that the bank ought to have apprised the notary who presented the bill of the receipt of assets.

(e) *Barclay v. Bailey*, 2 Camp. 527; *Morgan v. Davidson*, 1 Stark. 114, E. C. L. R. vol. 2.

(f) *Wilkins v. Jadis*, 2 B. & Ad. 188, E. C. L. R. vol. 22; 1 M. & Ry. 41, S. C.

(g) *Ibid.*; and see *Triggs v. Newnham*, 10 Moore, 249; 1 C. & P. 631, E. C. L. R. vol. 12, S. C.

(1) Business hours, except in the case of banks, range through the whole day down to the hours of rest in the evening. *Cayuga Bank v. Hunt*, 2 Hill, 635; *Nehan v. Fotterall*, 7 Leigh, 179; *Dana v. Sawyer*, 9 Shepl. 244. Where a note was made payable at a bank, a demand made at the bank upon the proper day after banking hours, the officers being there, and a refusal, the cashier stating that no funds were deposited for the purpose, held that the demand was sufficient. *Cohen v. Hunt*, 2 Smedes & Marshall, 227; *The Bank v. Hamer*, 7 Howard (Miss.), 448; *Flint v. Rogers*, Shepl. 67.

against the acceptor, to aver and prove presentment at such place.^(h) This decision occasioned the passing of the 1 & 2 Geo. 4, c. 78, by which it is enacted, that an acceptance, payable at a particular place, is a general acceptance, unless expressed to be payable there only, and not otherwise or elsewhere. On this statute it has been decided, that an acceptance is general, though the bill be made payable at a particular place by the drawer, and not by the acceptor.⁽ⁱ⁾ A declaration in an action against the *acceptor, alleging a bill to be accepted, payable at a banker's, need not aver presentment [*167] at the house of that banker.^(k) "Since the statute," says the Court of Errors, "a bill drawn generally on a party may be accepted in three different forms, *i. e.* either first generally, or, secondly, payable at a particular banker's, or, thirdly, payable at a particular banker's and not elsewhere. If the drawee accepts in the second form, payable at a banker's, he undertakes, since the statute, to pay the bill at maturity, when presented for payment, either to himself or at the banker's. Here the bill was accepted according to the second of these three forms."^(l)

It seems that in an action against the *drawer*, if the bill be accepted, and payable at a particular place named by the *acceptor*, it is still necessary to prove presentment there.^(m) At all events, if the bill be *drawn*, payable at a particular place, presentment must be made there in order to charge the drawer. "The doubt," says Tindal, C. J., "which had been formed before the statute, as to the effect of an acceptance, payable at a particular place, was confined to the case where the question arose between the holder and the acceptor: in cases between the indorsee and the drawer, upon a special acceptance by the drawee, no doubt appears to have existed, but that a presentment at a place specially designated *in the acceptance* was necessary, in order to make the drawer liable upon the dishonor of the bill by the acceptor. Still less did the doubt ever extend to cases where the drawer directed, by the body of the bill, that the money should be paid in a particular place. Such, then, being the state of the drawer's

(h) *Rowe v. Young*, 2 B. & B. 165, E. C. L. R. vol. 6; 1 Bligh, 391, S. C.

(i) *Selby v. Eden*, 3 Bing. 611, E. C. L. R. vol. 11; 11 Moo. 511, S. C.; *Fayle v. Bird*, 6 B. & C. 531, E. C. L. R. vol. 13; 9 Dowl. & R. 639, E. C. L. R. vol. 22; 2 C. & P. 303, E. C. L. R. vol. 12, S. C.

(k) *Halstead v. Skelton*, 5 Q. B. Rep. 92, E. C. L. R. vol. 48.

(l) *Ibid.*

(m) *Gibb v. Mather*, 8 Bing. 214, E. C. L. R. vol. 21; 1 M. & Sc. 387; 2 C. & J. 254,* S. C.

liability at the time the statute was passed, it must still remain the same, unless that statute has made an alteration therein. But it appears to us, that the statute neither intended to alter, nor has it in any manner altered, the liability of drawers of bills of exchange, but that it is confined in its operation to the case of acceptance alone.”(n)

If the bill be made payable at a banker's, a presentment there will suffice.(o) And if the bill be accepted, payable at a banker's, which banker happens to become the holder at its maturity, that fact alone amounts to presentment, and no other *proof is necessary.(p) [*168] If a bill be made payable in a particular town, a presentment at all the banking houses there will suffice;(q) if at one of two towns, a presentment at either;(r) if a particular house be pointed out by the bill as the acceptor's residence, a presentment to any inmate;(s) or if the house be shut up, at the door, will suffice.(t)

But where a bill is accepted, payable at a particular place,(u) it is not necessary in an action against the drawer(v) to state the acceptance in the declaration, and, therefore, not necessary to state it to be at a particular place, nor to allege presentment at that place. Such a presentment as the acceptance requires is merely matter of evidence.(w) But, if the special acceptance be alleged in the declaration, it may be necessary to state in an action against a *drawer or indorser* such a presentment as the acceptance requires, though a general allegation may suffice after verdict.(x) If a bill be made payable at a

(n) *Gibb v. Mather*, ubi supra. See *Parks v. Edge*, 1 C. & Mees. 429;* 3 Tyr. 364, S. C.; *Harris v. Parker*, 3 Tyrw. 370; *Walter v. Cubley*, 2 C. & Mees. 151;* 4 Tyr. 87, S. C.; *Boydell v. Harkness*, 3 C. B. Rep. 168, E. C. L. R. vol. 54.

(o) *Saunderson v. Judge*, 2 H. B. 509; *Harris v. Parker*, 3 Tyrh. 370.

(p) *Bailey v. Porter*, 14 M. & W. 44.*

(q) *Hardy v. Woodroffe*, 2 Stark. 319, E. C. L. R. vol. 3.

(r) *Beeching v. Gower*, Holt, N. P. C. 313.

(s) *Buxton v. Jones*, 1 M. & G. 83, E. C. L. R. vol. 39.

(t) *Hine v. Allely*, 4 B. & Ad. 624, E. C. L. R. vol. 24; 1 N. & M. 433, S. C.

(u) In an action against the acceptor, the bill may be described as payable at a particular place, though not accepted payable there only. *Blake v. Beaumont*, 4 M. & G. 7, E. C. L. R. vol. 43.

(v) See further as to the pleadings in an action against the acceptor, p. 166; and the Chapter on *Pleading*.

(w) *Parks v. Edge*, 1 C. & Mees. 429;* 3 Tyr. 364, S. C.; *Harris v. Parker*, 3 Tyrw. 370; *Hine v. Allely*, 4 B. & Ad. 624, E. C. L. R. vol. 24; 1 N. & M. 433, S. C.; and see *Hawkey v. Borwick*, 4 Bing. 135, E. C. L. R. vol. 13; *Hardy v. Woodroffe*, 2 Stark. 319, E. C. L. R. vol. 3.

(x) *Lyon v. Holt*, 5 M. & W. 250.* The sufficiency, however, of such a general allegation, even after verdict, does not seem to be perfectly clear, at all events where no issue is taken on the presentment. In a recent action against the drawer,

particular place, it is not necessary to state a presentment *to the acceptor* there, it is sufficient to state a presentment at that place.^(y) An averment that a bill was presented to the acceptor will be satisfied by proof that it was presented at the place where it was made payable, though no person were there ^{in attendance,}^(z) and though the [*169] acceptor did not live there.^(a)

The statute 1 & 2 Geo. 4, c. 78,^(b) does not extend to promissory notes. If, therefore, a note be, *in the body of it*, made payable at a particular place, it is still necessary to aver and to prove presentment there;^(c) though the mention of the place be in a distinct sentence preceded by a full stop.^(d)

where the bill was drawn and accepted payable in London, but there was no traverse of the general allegation of presentment, it was held that the statement of the venue London in the margin of the declaration cured the defect. *Wilmot v. Williams*, 14 L. J. 33, C. P.; 7 M. & Gr. 1017, E. C. L. R. vol. 49, S. C.; and see *Boydell v. Harkness*, 3 C. B. Rep. 168, E. C. L. R. vol. 54.

^(y) *Shelton v. Braithwaite*, 8 M. & W. 252; * *Hawkey v. Borwick*, 1 Y. & J. 376; * 4 Bing. 135, E. C. L. R. vol. 13; 12 Moore, 478, S. C.; *Philpot v. Bryant*, 3 C. & P. 244, E. C. L. R. vol. 14; 4 Bing. 717, E. C. L. R. vol. 13; 1 M. & P. 754, S. C.; and see *Bush v. Kinnear*, 6 M. & Sel. 210; *Huffam v. Ellis*, 3 Taunt. 415; *Ambrose v. Hopwood*, 2 Taunt. 61; *De Bergareche v. Pillin*, 3 Bing. 476, E. C. L. R. vol. 11; 11 Moore, 350, S. C.

^(z) *Hine v. Allely*, 4 B. & Ad. 624, E. C. L. R. vol. 24; 1 N. & M. 433, S. C.; and see *Hardy v. Woodroffe*, 2 Stark. 319, E. C. L. R. vol. 3. So where a bill was drawn on an acceptor at 38 Minto Street, accepted generally, and when due the acceptor having changed his residence was presented to a lodger at No. 38; the presentment was held sufficient. *Buxton v. Jones*, 1 Man. & Gran. 83, E. C. L. R. vol. 39; 1 Scott, N. R. 19, S. C.

^(a) *Hardy v. Woodroffe*, 2 Stark. 319, E. C. L. R. vol. 3.

^(b) But notwithstanding this act, and independently of the decision in *Gibb v. Mather*, 8 Bing. 214, E. C. L. R. vol. 21; 2 Moo. & Scott, 387, S. C., if a bill be accepted, payable at a particular place (though not expressed to be payable there only, and not otherwise or elsewhere), the addition of the place where payable is not surplusage; for upon default made at that place, the right of the holder to sue the previous parties to the bill is complete. *Mackintosh v. Haydon*, Ryan & Moody, 362, E. C. L. R. vol. 21; *Hawkey v. Borwick*, 4 Bing. 135, E. C. L. R. vol. 13; 12 Moo. 478, S. C.; *Harris v. Packer*, 3 Tyrhw. 370; *Smith v. Bellamy*, 2 Stark. 223, E. C. L. R. vol. 3. Before the act, the holder must have presented there, and could present nowhere else. Now, he may present effectually there; but, as was supposed, until the decision in *Gibb v. Mather*, may also present to the acceptor himself.

^(c) *Saunderson v. Bowes*, 14 East, 500; *Howe v. Bowes*, 16 East, 112; *Rowe v. Young*, 2 B. & B. 165; *Williams v. Waring*, 10 B. & C. 2, E. C. L. R. vol. 21; *Emblin v. Dartnell*, 12 M. & W. 830; * *Spindler v. Grellett*, 17 L. J. 6, Exch.; 1 Exch. Rep. 384, * S. C.; but see *Nichols v. Bowes*, 2 Camp. 498.

^(d) *Vanderdonckt v. Thelluson*, 19 L. J. 13, C. P.

But, if the place of payment be merely mentioned in a memorandum, that is held to be only a direction, and not to qualify the contract; and, consequently, a presentment there is not essential.^(e) And an averment in the declaration, that the note was made payable there, has even been held a fatal misdescription.^(f)⁽¹⁾

The consequence of not duly presenting a bill or note is, that all

(e) *Price v. Mitchell*, 4 Camp. 200; *Williams v. Warning*, 10 B. & C. 2, E. C. L. R. vol. 21; 5 M. & R. 9, S. C. But in a case where the body of the note was printed, except the sum, the names of the parties, and the date, and the memorandum of the place at which the note was payable, was also printed, Lord Ellenborough held a special presentment there necessary. *Trecothick v. Edwin*, 1 Stark. 468, E. C. L. R. vol. 2; *sed quære*. The memorandum is no part of the note, though it be preceded by the words "payable at." *Masters v. Barretto*, 19 L. J. 50, C. P.

(f) *Exon v. Russell*, 4 M. & Sel. 505.

(1) If a bill is accepted payable at a particular place, and such acceptance is acquiesced in by the holder, he must demand payment at such place in order to charge the drawer. *Tuckerman v. Hartwell*, 3 Greenleaf, 147.

Where a bill is made payable at a particular place, presentment for payment at that place is sufficient to hold the drawer. *Evans v. St. John*, 9 Porter, 186.

Where a note is payable at a given time and place, no demand of payment at such time and place are necessary. Where the maker is, however, ready at such time and place with the means of payment, such readiness is equivalent to tender. *Otis v. Barton*, 10 N. Hamp. 433; *Brabston v. Gibson*, 9 Howard, U. S. 263; *Lyon v. Williamson*, 27 Maine, 149; *Bradford v. Cooper*, 1 Louis. Annual Rep. 325; *New Hope Delaware Bridge Co. v. Perry*, 11 Illinois, 467. When a note is payable at a certain bank, it is sufficient to charge the indorser that the note is there at maturity to be delivered if paid without a special demand. *Folger v. Chase*, 18 Pick. 63; *Jenks v. Doylestown Bank*, 4 Watts & Serg. 505; *State Bank v. Napier*, 6 Humph. 270; *Goodloe v. Godley*, 13 Smedes & Marshall, 233; *Roberts v. Mason*, 1 Ala. 373. In such a case in an action against the indorsers, it is not necessary for the holder to prove that the cashier was at the bank during all the business hours of the day of payment. The presumption is that he did his duty. *Brittain v. The Doylestown Bank*, 5 Watts & Serg. 87.

It is sufficient evidence of demand of payment and of refusal to pay a note payable at a particular place, if the note is left there, and no funds are provided to take it up. *Nichol v. Goldsmith*, 7 Wend. 160; *Wooden v. Foster*, 16 Barbour, 146.

The want of funds of the drawee at the bank will excuse the demand there, but this must be averred. *Bank of Wilmington v. Cooper*, 1 Harrington, 10; *Gillett v. Averill*, 5 Denio, 85; *Allen v. Smith*, 4 Harrington, 234. A note made negotiable at a bank is not therefore payable there. *Barrett v. Wills*, 4 Leigh, 114.

If a note is made payable at a particular bank, and if such bank before maturity ceases to exist, a demand in order to hold an indorser is excused. *Roberts v. Mason*, 1 Alabama, 373; *Central Bank v. Allen*, Shepl. 41.

the antecedent parties are discharged from their liability, [*170]
 *whether on the instrument, or on the consideration for which
 it was given.

The acceptor or maker, however, still continues liable. And, indeed, presentment is not in general necessary for the purpose of charging him; the action itself being held to be a sufficient demand, and that though the instrument be made payable on demand. (g) But if a bill or note be payable at or after sight, it must be presented in order to charge the acceptor or maker. (h) So must a note payable at a particular place, as we have just seen. (i) But, though the absence of demand be in general no defence, yet if the acceptor or maker pays on action brought without any previous demand, it seems the Court would, where they have the power, take the question of costs into consideration. (k)

There are circumstances, however, which will excuse the neglect to present for payment. (1)

(g) *Rumball v. Ball*, 10 Mod. 38; *Frampton v. Coulson*, 1 Wils. 33; *Norton v. Ellam*, 2 Mees. & W. 461.*

(h) *Dixon v. Nuttall*, 1 C. M. & R. 307;* 6 C. & P. 320, E. C. L. R. vol. 25, S. C.

(i) *Rhodes v. Gent*, 5 B. & Al. 244, E. C. L. R. vol. 7. Quære as to the effect of non-presentment of a bill at a particular place, if the drawee had lodged money there and lost it by the holder's delay.

(k) *McIntosh v. Haydon*, 1 R. & M. 362.

(1) An impossibility to present a bill for payment on the day it falls due, where the holder is in no fault, may render a subsequent presentment sufficient to charge the drawer; aliter of oversight or negligence in the post-office, by which a bill miscarries so that it cannot be presented till after it is due. *Schofield v. Bayard*, 3 Wendell, 488.

A bill of exchange was deposited by the holder in the post-office, in season to reach the place where it was payable before it fell due by the regular course of the next mail; and there was no reason to believe that it would not be there duly delivered. It was actually sent by that mail; but by mistake of the postmaster when it was mailed, the package containing it was misdirected, and in consequence thereof, was carried beyond its place of destination. The mistake being discovered, the bill was returned, and reached the place where it was payable on the day after it became due, which was Sunday. On the morning of the following day, the bill was delivered from the post-office to the agent of the holder, and payment demanded of the acceptor. Held, that the holder was not chargeable with a want of reasonable diligence. *Windham Bank v. Norton*, 22 Connecticut, 213.

The fact that a bill is lost is an excuse for delay in making demand, but for no more than a reasonable delay. *Aborn v. Bosworth*, 1 Rhode Island, 401.

Where a bill is seized under an extent, the indorsers are not discharged by non-presentment, for laches is not imputable to the Crown.^(l)

Neglect of presenting for payment is, as we have seen, excused in the case of a bank note payable on demand, and perhaps of other paper meant for circulation, if the holder, within the period at which he should have presented it, puts it into circulation.^(m)

If the acceptor or maker abscond, and his house be shut up, the bill or note may be treated as dishonored; but not if he have merely removed.⁽ⁿ⁾(1) If the drawee cannot be found, it will be sufficient to plead that fact, without averring that due search was made for [*171] him.^(o) Under an allegation that the *bill was presented, evidence that the drawee could not be found is inadmissible.^(p)

Absence of effects in the drawee's hands will, as against the drawer, dispense with the necessity of presenting for payment.^(q)

A declaration by the acceptor, before a bill is due, that he will not pay, though made in the drawer's presence, does not dispense with presentment to the acceptor and notice to the drawer.^(r)(2)

(l) West on Extents, 29, 30.

(m) Camidge v. Allenby, 6 B. & C. 373, E. C. L. R. vol. 13; 9 Dowl. & R. 391, S. C.

(n) Anon. 1 Ld. Raym. 743; Hardy v. Woodrooffe, 2 Stark. 319, E. C. L. R. vol. 3; Hine v. Allely, 4 B. & Ad. 624, E. C. L. R. vol. 24; 1 N. & M. 433, S. C.; Collins v. Butler, 2 Stra. 1087. See ante, p. 159, and Sands v. Clarke, 19 L. J. 84, C. P.

(o) Starke v. Cheesman, Carthew, 509; 1 Ld. Raym. 538, S. C.

(p) Leeson v. Pigott, T. 1788; Bayley, 6th ed. 409; and see Smith v. Bellamy, 2 Stark. 223, E. C. L. R. vol. 3.

(q) Terry v. Parker, 1 Nev. & Perry, 752; 6 Ad. & E. 502, E. C. L. R. vol. 33, S. C. See Prideaux v. Collier, 2 Stark, 57, E. C. L. R. vol. 3; Hill v. Heap, D. & R., N. P. C. 67; De Berdt v. Atkinson, 2 Hen. Bla. 336. But see the observations on this last case in Sands v. Clarke, 19 L. J. 87, C. P. Ex parte Bignold, 1 Deacon, 728; 2 Mont. & Ayr. 633, S. C.

(r) Ex parte Bignold, 1 Deac. 728; 2 Mont. & Ayr. 633, S. C.

(1) Where the maker of a note is a seaman, without a domicile in the state, who goes a voyage about the time the note falls due, no demand on him is necessary to charge the indorser. Moore v. Coffield, 1 Dev. 247. Absence of the maker of a note on a voyage at sea, his family still residing in the state, will not excuse a demand of payment so as to charge an indorser. Dennie v. Walker, 7 N. Hamp. 199.

(2) Where a note made payable at a bank, is not at the bank when it falls due, and no demand is then made on the maker, the indorsee cannot charge the indorser

It has been held, that neglect to present bankers' cash notes, the banker having failed, will be excused by returning them in due time.^(s)

Advantage from such neglect is waived by any antecedent party who subsequently, *with notice of the laches*, promises to pay the bill, or make, or promise to make, a partial payment on account of it.^(t)

As to the proper mode of pleading, where the plaintiff relies on any dispensation with presentment, see the Chapter on PLEADING.

The defendant's part-payment, or promise to pay, made after the bill or note is due, is *prima facie* evidence of presentment.^(u)

(s) *Henderson v. Appleton*, Chit. 9th ed. 356; *Rogers v. Langford*, 1 C. & M. 637; **Robson v. Oliver*, 10 Q. B. 704, E. C. L. R. vol. 59. See ante, p. 158, note (f).

(t) *Vaughan v. Fuller*, 2 Stra. 1246; *Hopley v. Dufresne*, 15 East, 275; *Haddock v. Bury*, 7 East, 236; *Hodge v. Fillis*, 3 Camp. 463. See *Goodall v. Dolly*, 1 T. R. 712; *Anson v. Bailey*, B. N. P. 276.

(u) *Croxon v. Worthen*, 5 M. & W. 5; **Lundie v. Robertson*, 7 East, 332; *Campbell v. Webster*, 15 L. J., 4 C. P.; 2 Q. B. Rep. 258, E. C. L. R. vol. 42, S. C.; *Greenway v. Hindley*, 4 Camp. 52.

by giving him reasonable notice of non-payment, although the maker had previously told the indorsee that it would be useless to send the note to the bank, because he could not pay it. See *Bank v. Spencer*, 5 Metc. 308; *Lang v. Young*, 8 English, 401.

The holder of a note need not demand payment and give notice, when the indorser, a few days before the maturity of the note, writes to him that the maker has failed, and asks indulgence until funds can be realized from security given by the maker. *Spencer v. Harvey*, 17 Wend. 489.

One who indorses a promissory note, inserting over his signature a waiver of demand and notice, is not entitled to any demand and notice. *Woodman v. Thurston*, 8 Cushing, 157. So an oral waiver at that time. *Barclay v. Weaver*, 19 Penna. State Rep. 396. An agreement with the maker by the payee, after he had negotiated it, that he would pay it and take it up, amounts to a waiver of demand and notice, and such agreement enures to the benefit of the indorsee. *Marshall v. Mitchell*, 35 Maine, 221.

Receiving from the maker a sum sufficient to meet the note, or taking ample security as indemnity for the same, amounts to a waiver, by the indorser, of due presentment. *Lewis v. Kramer*, 3 Maryland, 265.

When copartners purchase goods together, and give a promissory note therefor, with one of them as maker and the other as indorser, the latter is not liable on his indorsement unless he be duly notified of the dishonor of the note. *Foland v. Boyd*, 22 Penna. State Rep. 476.

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*CHAPTER XV.

OF PAYMENT.

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PAYMENT should be made to the holder and the real proprietor of the bill; for payment to any other party is no discharge to the acceptor; unless, indeed, the money paid finds its way into the holder's hands, and the holder has treated it as received in liquidation of the bill. A. drew a bill upon defendant, which defendant accepted; A. then indorsed it to the plaintiffs, his bankers, who entered it to the credit of plaintiff's account, and, at maturity, presented it to the defendant for payment, and it was dishonored. The plaintiffs then debited A. with the amount, but did not return him the bill. A few days afterwards, defendant paid the amount to A., A. still continued his banking account with the plaintiffs, and, at different times, paid in more money than was sufficient to cover the amount of the bill, and all the preceding items which stood above it in the account, though there was always a balance against him larger than the amount of the bill. A. failed, and the plaintiffs proved for the whole of their balance under his commission. They then brought this action on the bill against the defendant, the acceptor. Best, C. J., "The payment to A. would not of itself have discharged the defendant, the plaintiffs having been at that time the holders, and entitled to the amount of the bill; but the ground on which the defendant is discharged is,

that the plaintiffs not only entered the bill to the credit of A., but treated it as having been paid.”(a)

*It is a common practice in the city of London, to write across the face of a check the name of a banker. The effect [*173] of this crossing is to direct the drawees to pay the check only to the banker whose name is written across, and the object of the precaution is to invalidate the payment to a wrongful holder in case of loss. It seems, however, that the holder may erase the name of the banker and substitute that of another banker.(b) It is also not unusual to write the words, *and Co.*, only in the first instance, leaving the particular banker's name to be filled up afterwards, so as to insure the presentment by some banker or other.(c) C. drew a check on his banker payable to A. and B., assignees of C. or bearer, and wrote the name of their banker across it. B., who had a private account with the banker, paid the check into that account; it was held, that the bankers were justified in applying it to that account, the drawer's writing the name of the bankers of the payee of the check across it, not being, according to the custom of trade, information to the bankers that the money was the money of the payees.(d)

There are some cases in which payment to a wrongful holder is protected, and others in which it is not.(e) If a bill or note payable to bearer, either originally made so, or become so by an indorsement in blank, be lost or stolen, we have seen that a bona fide holder may compel payment. Not only is the payment to a bona fide holder protected, but payment to the thief or finder himself, will discharge the maker or acceptor,(f) provided such payment were not made with knowledge or suspicion of the infirmity of the holder's title, or under circumstances which might reasonably awaken the suspicions of

(a) *Field v. Carr*, 5 Bing. 13, E. C. L. R. vol. 15; 2 Moo. & P. 46, S. C. Where money is paid into a bank on the joint account of persons not partners in trade, the bankers are not discharged by payment of the check of one of those persons, drawn without the authority of the others: *Innes v. Stephenson*, 1 Moo. & Rob. 145; *Stone v. Marsh*, R. & M. 369; unless one alone afterwards become entitled to receive it. *Stewart v. Lee*, Mood. & M. 160; see ante, p. 18.

(b) *Stewart v. Lee*, 1 M. & M. 158, E. C. L. R. vol. 22; and see *Boddington v. Schlenker*, 4 B. & Ad. 752, E. C. L. R. vol. 24; 1 N. & M. 540, S. C.

(c) *Ibid.*

(d) *Ibid.*

(e) As to payment of a forged bill, see post, the Chapter on *Forgery of Bills*.

(f) *Smith v. Sheppard*, Sel. Ca. 243, MS. of Mr. Serjeant Bond, Chitty, 9th ed. 261.

a prudent man. "For it is a general rule, that where one of two innocent persons must suffer from the acts of a third, he who has enabled such third person to occasion the loss, must sustain it." (g) And supposing the equity of the loser and payer precisely equal, there is no reason why the law should interpose to shift the injury from one innocent man upon another. But, if such a payment be [*174] made under *suspicious circumstances, or without reasonable caution, or out of the usual course of business, it will not discharge the payer. (h) If payment be made before the bill or note is due, or long after it is due, or, in case of a check, long after it is drawn, that is a payment out of the usual course of business.

And, therefore, though a check be really drawn by a banker's customer, but torn in pieces before circulation by the drawer, with intention of destroying it, and a stranger, picking up the pieces, pastes them together, and presents the check soiled and so joined together to the banker, and he pays it, the banker cannot charge his customer with this payment, for the instrument was cancelled, and carried with it reasonable notice that it had been cancelled. (i)

If the bill or note be not payable to bearer, but transferable by indorsement only, and be paid to a wrong party, the payer is not discharged. (k)

A bill is not discharged, and finally extinguished, until paid by or on behalf of the acceptor; nor a note until paid by or on behalf of the maker. (1)

(g) *Lickbarrow v. Mason*, 2 T. Rep. 70.

(h) There is at present no authority for saying that a party honestly paying, is in as good a situation as a party honestly discounting. See p. 126.

(i) *Scholey v. Ramsbottom*, 2 Camp. 485.

(k) It has been contended, that each indorsement is a warranty of the validity of the prior indorsements, and that an indorser, who has been paid by the acceptor, is liable, if the indorsements to him turn out invalid, to be sued by the acceptor on an implied undertaking that he, as holder, was entitled to receive the amount of the bill. *East India Company v. Tritton*, 3 B. & C. 280, E. C. L. R. vol. 10; 5 Dowl. & R. 214, S. C.; *Smith v. Mercer*, 6 Taunt. 76, E. C. L. R. vol. 1; 1 Marsh. 453, E. C. L. R. vol. 4, S. C. *L'endosseur est garant solidaire avec les autres signataires de la verité de la lettre ainsi que du paiement à l'échéance. Pardessus*, 376. Tous ceux qui ont signé, accepté, ou endossé une lettre de change, sont tenus à la garantie solidaire envers le porteur. *Code de Commerce*, 140; *Lovell v. Martin*, 4 Taunt. 799.

(1) A payment made by a joint promisor on a note due cannot, by an arrangement with the payee, be revoked so as to revive the debt against the other parties. *Frost v. Martin*, 6 Foster, 422.

It was long an unsettled question, whether payment in part or in full by the drawer to the holder will discharge the acceptor pro tanto, or whether the holder may, nevertheless, recover the whole amount from the acceptor, and hold an equivalent to the amount received from the drawer, as money received of the acceptor to the drawer's use.^(l) It has been thought that the holder can only recover of the acceptor the amount of the bill *minus the sum paid by the drawer.^(m) The acceptor being the principal, and the drawer the security, it might seem that a payment by the drawer discharges the acceptor's liability to the holder pro tanto, and makes the acceptor liable to the drawer for money paid to his use, and that if the drawer pay the whole bill, nominal damages only can be recovered by the holder of the acceptor.⁽ⁿ⁾ The better opinion, however, seems to be, that in an action against the acceptor, payment by the drawer is no plea, but only converts the holder into a trustee for the drawer.^(o) But, payment by the drawer of an *accommodation* bill, is a complete discharge of the bill.^(p)

Payment by a stranger of the amount of a bill to the bankers, at whose house the bill is made payable by the acceptor, the party pay-

^(l) In *Johnson v. Kennion*, 2 Wils. 262, recognized in *Walwyn v. St. Quintin*, 1 B. & P. 658, it was held that the holder was entitled to recover the whole amount; but in *Bacon v. Searles*, 1 H. Bla. 88, it was considered that he could recover only the difference, and the report of the case of *Johnson v. Kennion* was reflected on. See *Pierson v. Dunlop*, Cowp. 571; *Reid v. Furnival*, 1 C. & Mees. 538; *5 C. & P. 499, E. C. L. R. vol. 24, S. C.; *Browne v. Rivers*, Doug. 455. To the doctrine that a payment by a subsequent party operates as a satisfaction of the bill to the amount of the payment, it may be objected, that if the bill be satisfied, the party making the payment can maintain no action *on the bill* against a prior party, but must sue such prior party for money paid to his use. Whereas it is the constant practice for an intermediate party, who has paid the bill, to sue prior parties *on the bill*. See *Callow v. Lawrence*, supra. The answer to this objection might have been that such a payment is, as to the rights and liabilities of parties subsequent to the party paying, a satisfaction, but as to the rights and liabilities of prior parties, it may, at the election of the party paying, merely operate to place him in the position of a party, to whom a negotiable instrument is assigned a second time.

^(m) Lord Abinger appears to have so ruled at nisi prius. *Hemming v. Brook*, 1 Car. & M. 57, E. C. L. R. vol. 41.

⁽ⁿ⁾ Mais comme ces differents debiteurs sont debiteurs envers lui de la même chose, le paiement qui lui est fait par l'un d'eux libere d'autant envers lui les autres. Poth. 106; see *Hemming v. Brook*, 1 Car. & M. 57, E. C. L. R. vol. 41.

^(o) So held, it is believed, in the C. P. Sittings after T. T. 1850; *Jones v. Broadhurst*.

^(p) *Lazarus v. Cowie*, 3 Q. B. Rep. 459, E. C. L. R. vol. 43.

ing obtaining possession of the bill, is not a payment by the acceptor.(q)(1)

The acceptor of a bill, whether inland or foreign, or the maker of a note, should pay(r) it on a demand made, at any time within business hours, on the day it falls due. And, if it be not paid on such demand, the holder may instantly treat it as dishonored.(s)

[*176] *But the acceptor has the whole of that day within which to make payment; and though he should, in the course of that day, refuse payment, which refusal entitles the holder to give notice of dishonor, yet if he subsequently, on the same day, makes payment, the payment is good, and the notice of dishonor becomes of no avail.(ss)

A plea of tender,(t) by the acceptor after the day of payment, is insufficient.(u)

(q) *Deacon v. Stodhart*, 2 Man. & Gr. 317, E. C. L. R. vol. 40. As to payment by a stranger, see *Jones v. Broadhurst*, supra.

(r) If a banker who has funds in his hands refuse to pay a check, he thereby subjects himself to an action at the suit of his customer, the drawer. *Marzetti v. Williams*, 1 B. & Ad. 415, E. C. L. R. vol. 20; 1 Tyr. 77, S. C. So, if he refuse to pay a bill of his customer, made payable at the banking house; but in order to charge the banker, the presentment must be within banking hours. *Whitaker v. Bank of England*, 1 C. M. & R. 744; * 6 C. & P. 700, E. C. L. R. vol. 25; 1 Gale, 54, S. C. See the Chapter on *Presentment for Payment*.

(s) *Ex parte Moline*, 1 Rose, 303; *Burbridge v. Manners*, 3 Camp. 193; *Leftley v. Mills*, 4 T. R. 170; *Haynes v. Birks*, 3 B. & P. 599.

(ss) *Hartley v. Case*, 1 C. & P. 555, E. C. L. R. vol. 12; 4 B. & C. 339, E. C. L. R. vol. 10; 6 D. & R. 505, E. C. L. R. vol. 16; S. C.

(t) As to *payment* where there are nominal damages, see *Beaumont v. Greathead*, 2 C. B. Rep. 494, E. C. L. R. vol. 52.

(u) *Hume v. Peploe*, 8 East, 168. But a *drawer or indorser* is not bound to pay till notice and request; and, therefore, a plea of tender, after the bill became due, might be good, if pleaded by a drawer and indorser. And, as a drawer or indorser has a reasonable time to pay, he might, it should seem, plead a tender even after request, and of principal only, without interest. *Walker v. Barnes*, 5 Taunt. 240, E. C. L. R. vol. 1; 1 Marsh. 36, E. C. L. R. vol. 4, S. C.; *Soward v. Palmer*, 8

(1) Where the holder of a bill of exchange accepted for the accommodation of the drawer sends it to the bank for collection, and the bank, when the bill comes to maturity, passes the amount thereof to the credit of the holder, this is not such a payment as discharges the acceptor; but the bank succeeds to the rights of the holder, and may maintain an action on the bills against the acceptor. *Pacific Bank v. Mitchell*, 9 Metcalf, 297.

If a bill or note be paid before it is due, and is afterwards indorsed over, it is a valid security in the hands of a bona fide indorsee. "I agree," says Lord Ellenborough, "that a bill paid at maturity cannot be reissued, and that no action can be afterwards maintained upon it, by a subsequent indorsee. A payment before it becomes due, however, I think, does not extinguish it, any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills and notes; for it would be impossible to know whether there had not been an anticipated payment of them."(*v*)

If the holder constitutes any one of the parties liable to him his executor, and die, the appointment is equivalent to payment and a release.(*w*) A premature release will not, any more than a premature payment, protect the releasee from liability to a subsequent holder without notice.(*x*)

But the payment of a note payable on demand will be a defence, even against an indorsee, for value without notice;(*y*) *for the statute, which imperatively prohibits the reissuing of such a [*177] note, dispenses with notice.(*z*)

A payment after action brought will not prevent the holder from proceeding for his costs.(*zz*)

If the bill be paid, the payer has a right to insist on its being delivered up to him; but, if it be not paid, the holder should keep it. Yet it has been held, that an agent is justified, by the usage of trade, in delivering it up on receiving a check, though that check is afterwards dishonored.(*a*) But the drawers or indorsers, in such a case, would be discharged, for they have a right to insist on the production of the bill, and to have it delivered up on payment by them.(*b*)

Taunt. 277, E. C. L. R. vol. 4; 2 Moo. 274; but see *Siggers v. Lewis*, 1 C. M. & R. 370;* 4 Tyrw. 847; 2 Dowl. 681, S. C.; where a plea that the action was commenced before a reasonable time for the defendant, the indorser, to pay the bill, was held ill.

(*v*) *Burbridge v. Manners*, 3 Camp. 193; *Morley v. Culverwell*, 7 M. & W. 174.*

(*w*) *Freakley v. Fox*, 9 B. & C. 130, E. C. L. R. vol. 17; 4 M. & Ry. 18, S. C. See the law on this point more fully discussed in Chapter V, tit. *Executors*.

(*x*) *Dod v. Edwards*, 2 C. & P. 602, E. C. L. R. vol. 12.

(*y*) *Bartrum v. Caddy*, 9 Ad. & E. 275, E. C. L. R. vol. 36; 1 Per. & Dav. 207, S. C.

(*z*) *Thompson v. Brown*, 1 M. & M. 40, E. C. L. R. vol. 22.

(*zz*) *Toms v. Powell*, 6 Esp. 40; 7 East, 536, S. C.

(*a*) *Russell v. Hankey*, 6 T. R. 12.

(*b*) *Powell v. Rqche*, 6 Esp. 76, vide ante, p. 16.

If the holder of a check receive bank notes instead of cash, and the banker fail, the drawer is discharged.(c)

A set-off does not amount to payment, unless it be mutually agreed that one demand shall be set-off against the other. Such an agreement amounts to payment.(d) And an agreement, even by one of several partners, with a debtor to the firm, that a separate debt due from the partner, shall be set-off against a joint debt due to the firm, binds the firm.(e) Credit given to the holder of a bill by the party ultimately liable, is tantamount to payment.(f) Where a banker takes from a customer and his surety a promissory note, intended to secure a running balance, and makes advances on the faith of the note, it is not discharged by subsequent unappropriated repayments made by the customer to the banker, but still continues as a security for the existing balance.(g)

There are many circumstances under which a legacy by a debtor to his creditor, of equal or greater amount than the debt, will be considered a satisfaction of the debt. But a legacy to the holder of a *negotiable* bill or note can never be considered as a satisfaction of the debt on that instrument. For a legacy is a satisfaction when it may be presumed to have been the intention of the testator that it should so operate; but that cannot be presumed, when, from the [*178] *assignable nature of the debt, the testator could not tell whether or no the legatee was at the time of the bequest his creditor.(h)

Where a man is indebted to another in several items, and makes a partial payment, it often becomes a question, important, not only to parties themselves, but third persons, to which of the items the payment shall be imputed. The rule of the Roman law, and therefore in general of Continental law is, that a payment shall be appropriated, first, according to the intention of the debtor at the time of

(c) *Vernon v. Boverie*, 2 Show. 296.

(d) *Callander v. Howard*, 19 L. J. 312, C. P.

(e) *Wallace v. Kelsall*, 7 M. & W. 264; * see *Gordon v. Ellis*, 7 M. & G. 607, E. C. L. R. vol. 49; 2 C. B. Rep. 821, E. C. L. R. vol. 52, S. C.

(f) *Atkins v. Owen*, 4 Nev. & Man. 123; 2 Ad. & El. 35, E. C. L. R. vol. 29, S. C.

(g) *Pease v. Hirst*, 10 B. & C. 122, E. C. L. R. vol. 21; 5 M. & Ry. 88, S. C.; see p. 96.

(h) *Carr v. Eastabrook*, 3 Ves. 561.

making it;(*i*) but, if that be unknown, then secondly, at the election of the creditor,(*k*) signified to the debtor at the time of receiving it.(*l*) If the intention of neither be known, payment must then be appropriated according to the presumed intention of the debtor, and will be presumed that he meant to discharge such debts as were most burdensome: as, a debt carrying interest, rather than one which carries none; a debt secured by a penalty, rather than one resting on a simple stipulation; a debt, on which he may be made a bankrupt, rather than one which will not subject him to such a liability. If all the debts are equal in degree, the payment must then be imputed to them according to their respective priority in the order of time.(*m*) Such is the rule of the civil law, from which, in some particulars, the common law differs. Wherever the transactions between the two parties form one general account current, or are treated by them as such, payments are to be imputed to debts in the order of time, and the balance is to be struck at the foot of the account.(*n*) But, if an unappropriated payment be made on account of several distinct insulated debts, which cannot be considered in the light of a running account between the parties, the common law then differs from the civil law, and gives the creditor a right of appropriating it any time before action,(*o*) as he pleases,(*p*) *provided a prior [*179] appropriation have not been communicated to the debtor.

(*i*) *Quotiens quis debitor ex pluribus causis unum debitum solvit, est in arbitrio solventis dicere quod potius debitum voluerit solutum, et quod dixerit, id erit solutum.* D. 46, 3, 1. Vide etiam Cod. 8, 43, 1.

(*k*) *Quotiens vero non dicimus ad quod solutum sit, in arbitrio est accipientis cui potius debito acceptum ferat.* D. 46, 3, 1. Cod. 8, 43, 1.

(*l*) *Dum in re agenda (in re præsenti, hoc est statim atque solutum est) hoc fiat; ut vel creditori liberum sit non accipere vel debitori non dare, si alio nomine exsolutum quis eorum velit: cæterum postea non permititur.* D. 46, 3, 1 2, 3.

(*m*) D. 46, 3. If all the debts were equal and alike in every respect, the sum paid was applied to a ratable reduction of them all. See *Favenc v. Bennett*, 11 East, 36.

(*n*) *Clayton's case*, Meriv. 604.

(*o*) *Simson v. Ingham*, 2 B. & C. 65, E. C. L. R. vol. 9; 3 D. & Ry. 249; *Mills v. Fowkes*, 5 Bing. N. C. 455, E. C. L. R. vol. 35; 7 Scott, 444, S. C.

(*p*) *Clayton's case*, 1 Meriv. 604; *Bodenham v. Purchas*, 2 B. & Ald. 39; *Stoveld v. Eade*, 4 Bing. 154, E. C. L. R. vol. 13; 12 Moo. 370; *Field v. Carr*, 2 Moo. & P. 46; 5 Bing. 13, E. C. L. R. vol. 15; *Goddard v. Cox*, 2 Stra. 1194; *Bosanquet v. Wray*, 6 Taunt. 597, E. C. L. R. vol. 1; 2 Marsh. 319, E. C. L. R. vol. 4, S. C.; *Kirby v. Duke of Marlborough*, 2 M. & Sel. 18; *Plomer v. Hayne*, 1 Stark. 153, E. C. L. R. vol. 2; *Woodroffe v. Hayne*, 1 C. & P. 600, E. C. L. R. vol. 12; *Shaw v. Picton*, 4 B. & C. 715, E. C. L. R. vol. 10; 7 Dowl. & R. 201, S. C.; *Marsh v.*

An appropriation which would have the effect of paying one man's debt with another man's money, will not be allowed.(q) Nor can there be an appropriation which would deprive a debtor of a benefit, such as the taxation of costs.(r)

A payment may be imputed to a demand for which the creditor could not recover at law.(s) But the law will ascribe a payment to a legal debt, rather than to an illegal one.(t) A party receiving money for the use of another from a third person, which is not properly a payment, but a set-off, cannot appropriate the money without the knowledge or consent of him for whom it has been received.(u) It has been held, that a payment may be appropriated to a disputed debt, if it be really a good debt.(v)

There are cases where a payment is appropriated by law to several debts proportionally.

Thus, where a principal debtor has assigned his effects to a trustee for his creditors, a creditor who has a guarantee for part of his debt will be forced, even at law, to apply in discharge thereof a rateable part of any payment that he may receive from the trustee.(w)(1)

Houlditch, Chitty, 9th ed. 404; *Hammersley v. Knowlys*, 2 Esp. 666; *Birch v. Tebbutt*, 2 Stark. 74, E. C. L. R. vol. 3; *Marryatts v. White*, 2 Stark. 101, E. C. L. R. vol. 3; *Meggott v. Mills*, 1 Ld. Raym. 286; *Dawe v. Holdsworth*, Peake, 64; *Peters v. Anderson*, 5 Taunt. 596, E. C. L. R. vol. 1; *Wright v. Laing*, 3 B. & C. 165, E. C. L. R. vol. 10; 4 Dowl. & R. 783; *Gough v. Davis*, 4 Price, 200; *Strange v. Lee*, 3 East, 484; *Simson v. Ingham*, 2 B. & C. 65, E. C. L. R. vol. 9; 3 Dowl. & R. 249; *Mills v. Fowkes*, 5 Bing. N. C. 455, E. C. L. R. vol. 35; 7 Scott, 444, S. C.

(q) *Thompson v. Brown*, 1 M. & M. 40, E. C. L. R. vol. 22.

(r) *James v. Child*, 1 Tyrw. 735; 2 C. & J. 252,* S. C.

(s) *Crookshanks v. Rose*, 1 M. & R. 100; 5 C. & P. 19, E. C. L. R. vol. 24, S. C.

(t) *Wright v. Laing*, 3 B. & C. 165, E. C. L. R. vol. 10; 4 Dowl. & R. 783.

(u) *Waller v. Lacy*, 1 M. & Gr. 54, E. C. L. R. vol. 39; 1 Scott, N. R. 186, S. C.

(v) *Williams v. Griffith*, 5 M. & W. 300.*

(w) *Baidwell v. Lydall*, 7 Bing 489, E. C. L. R. vol. 20; see *Raikes v. Todd*, 1 P. & D. 138; 8 Ad. & E. 846, E. C. L. R. vol. 35, S. C.; *Paley v. Field*, 12 Ves. jun. 435. See another instance of ratable appropriation in *Favenc v. Bennett*, 11 East, 36.

(1) The debtor has the first right to direct the application of any payment he may make. *Taylor v. Sandiford*, 7 Wheaton 13; *Reed v. Boardman*, 20 Pick. 441; *Martin v. Draher*, 5 Watts, 544; *McDonald v. Pickett*, 2 Bailey, 617; *Mitchell v. Dull*, 4 Gill & Johns. 361; *Selfridge v. Northampton Bank*, 8 Watts & Serg. 320; *Runyon v. Latham*, 5 Iredell, 551; *Howland v. Rench*, 7 Blackford, 236; *Rackley v. Pearce*, 1 Kelly, 241; *Randall v. Parramore*, 1 Branch, 409; *U. States v. Bradbury*, Daveis, 146.

Part payment of the debt by the party liable is no discharge of the

The rule that a debtor may apply payment as he pleases, applies only to voluntary payments, and not to those made by process of law. *Blackstone Bank v. Hill*, 10 Pick. 129.

If no appropriation be made by him, it then devolves upon the creditor to make it. *Mitchell v. Dull*, 2 Har. & Gill, 159; *Alexandria v. Patten*, 4 Cranch, 316; *Brady v. Hill*, 1 Missouri, 315; *Blinn v. Chester*, 5 Day, 166; *Brewer v. Knapp*, 1 Pick. 332; *Blackstone Bank v. Hill*, 10 Ibid. 129; *Arnold v. Johnson*, 1 Scam. 196; *Logan v. Mason*, 6 Watts & Serg. 9; *Washington Bank v. Prescott*, 20 Pick. 339; *Allen v. Kimball*, 23 Ibid. 473; *Jones v. U. States*, 7 Howard, U. S. 681; *Van Rensselaer v. Roberts*, 5 Denio, 470; *Sawyer v. Tappan*, 14 N. Hamp. 352.

Yet the creditor must make, it has been held, such an application as the debtor could not reasonably or justly object to. *Ayer v. Hawkins*, 19 Vermont, 26; *Cowperthwait v. Sheffield*, 1 Sandf. S. C. Rep. 416; *Parchman v. McKinney*, 12 Smedes & Marshall, 631; *Bancroft v. Dumas*, 21 Vermont, 456; *Caldwell v. Wentworth*, 14 N. Hamp. 431.

A debtor or creditor cannot appropriate a payment in such manner as to affect the relative liabilities or rights of sureties without their consent. *Postmaster-General v. Norvell*, Gilpin, 106; *Bank v. Brown*, 12 N. Hamp. 320; *Myers v. U. States*, 1 M'Lean, 493.

When a debtor makes payments without specifying the application, the creditor cannot apply them to debts not due if there are other debts which are due. *Bacon v. Brown*, 1 Bibb, 334; *McDowell v. Canal Co.*, 5 Mason, 11; *Seymour v. Sexton*, 10 Watts, 255.

If application be directed by neither, then the law will make the application according to equity. *Postmaster-General v. Norvell*, Gilpin, 106; *Harker v. Conrad*, 12 Serg. & Rawle, 301; *U. States v. Kirkpatrick*, 9 Wheaton, 720; *Cremer v. Higginson*, 1 Mason, 323; *Gwinn v. Whitaker*, 1 Har. & Johns. 754; *Briggs v. Williams*, 2 Vermont, 283; *Robinson v. Doolittle*, 12 Vermont, 256; *Randall v. Parramore*, 1 Branch, 409; *Bayley v. Wynkoop*, 5 Gilman, 449.

It has been held that such application by the law shall be made as the debtor may be presumed to have done—in other words, as would be most for his interest at the time. *Hilton v. Burley*, 2 New Hamp. 193; *Dorsey v. Garraway*, 2 Har. & Johns. 402; *Dedham Bank v. Chickering*, 4 Pick. 314; *U. States v. Bradbury*, Daveis, 146.

The law will make the application first to interest and then to principal. *Gwinn v. Whitaker*, 1 Har. & Johns. 754; *Frazier v. Hyland*, Ibid. 98; *Prebles v. Gee*, 1 Dev. 341; *Spires v. Hamot*, 8 Watts & Serg. 17; *De Bruhl v. Neuffer*, 1 Strobhart, 426; *Bond v. Jones*, 8 Smedes & Marshall, 368; *Righter v. Stall*, 3 Sand. Ch. Rep. 608; *Jencks v. Alexander*, 11 Paige, 619; *Hart v. Dorman*, 2 Florida, 445.

To the debt which is prior in date. *Allston v. Contee*, 4 Har. & Johns. 351; *U. States v. Kirkpatrick*, 9 Wheat. 720; *Fairchild v. Holly*, 10 Conn. 175; *Postmaster General v. Furber*, 4 Mason, 332; *McKenzie v. Nevins*, 9 Shep. 138; *Berghaus v. Alter*, 9 Watts, 386; *Boody v. U. States*, 1 Woodbury & Minot, 150; *Upham v. Le-favour*, 11 Metcalfe, 174; *U. States v. Bradbury*, Daveis, 146; *Caldwell v. Wentworth*, 14 N. Hamp. 431.

To that debt which is less secured. *Moss v. Adams*, 4 Ired. Eq. 42; *Jones v. Kilgore*, 2 Richardson Eq. 63; *Bain v. Williams*, 10 Smedes & Marshall, 113.

[*180] whole debt,(x)(1) but part payment by a stranger may *be.(xx) And it has been held, that where a promissory note is due and unpaid, so that not only the principal, but interest (at least to a nominal amount) is due also, the principal may be taken in satisfaction of the debt and damage.(y)

As the lapse of twenty years(z) is sufficient to raise presumption that a bond has been paid, so it has been held to be a good defence to an action on a promissory note payable on demand.(a) But if during this period the plaintiff was an alien enemy, and payment to him would consequently have been illegal, such a presumption would not, it seems, arise.(b)

The production of a check drawn by the defendant on his banker, and indorsed by the plaintiff, is evidence of payment;(c) but not if there have been several transactions between the parties, without evidence to connect the delivery of the check with the payment in question.(d) A bill or note once in circulation over due, and coming out of the hands of the acceptor or maker, is presumed to be paid. Thus it is a maxim of the Scotch law, *chirographum apud debitorem reperiuntur presumitur solutum*. But the mere production of a bill from the custody of the acceptor is not prima facie evidence of his having paid it, without proof of its having been once in circulation after it had been accepted.(e)(2)

(x) Fitch v. Sutton, 5 East, 230. When a bill or note may be satisfaction. See post, Chapter XVI.

(xx) Welby v. Drake, 1 C. & P. 557, E. C. L. R. vol. 12. Post, p. 181.

(y) Beaumont v. Greathead, 15 L. J. 131, C. P.; 3 D. & L. 631; 2 C. B. Rep. 494, E. C. L. R. vol. 52, S. C.

(z) See now 3 & 4 Wm. 4, c. 42, s. 3.

(a) Duffield v. Creed, 5 Esp. 52.

(b) Du Belloix v. Lord Waterpark, 1 D. & R. 16, E. C. L. R. vol. 16

(c) Egg v. Barnett, 3 Esp. 196. See ante, p. 16.

(d) Aubert v. Walsh, 4 Taunt. 293.

(e) Pfiel v. Vanbatenbery, 2 Camp. 439.

To make an application of a payment the person paying must give directions before or at the time of payment. Reynolds v. M'Farlane, 1 Overton, 488; Moss v. Adams, 4 Ired. Eq. 42.

(1) A part payment of what a person is bound in law to pay, forms no consideration for postponing the residue; neither can the verbal promise of the plaintiff to postpone the payment of the balance be enforced. Price v. Cannon, 3 Missouri, 453; Wheeler v. Wheeler, 11 Vermont, 60.

(2) If a bill be sent to the drawee, and he be directed to pass it to the credit of

The party paying a bill or note has a right to insist on its being delivered up to him.(f) But, where a bill or note is not negotiable, he cannot refuse to pay it till it is delivered up.(g)

It was formerly held,(h) that a party paying a debt could not in general demand a receipt for the money, and therefore that a tender, on condition of having a receipt, was insufficient.(i) It has since, however, been enacted, by 43 Geo. 3, *c. 126, s. 5, that a person to whom money has been paid is bound to give a receipt, [*181] and that if he refuses to fill up a blank stamp paper presented to him for that purpose, and to pay the stamp, he becomes liable to a penalty of 10*l*.(k) It is usual to write a receipt on the back of bills, and it has been said that it is the duty of bankers to make some memorandum on bills or notes which have been paid.(l) A receipt on a bill or note, duly stamped, does not require an additional stamp.(m) And a receipt on a distinct piece of unstamped paper, though it cannot be looked at as evidence of the payment, may be shown to a witness who has signed it, to refresh his memory, and enable him to speak to the fact of payment.(n) Letters by the general post, acknowledging the safe arrival of any bills of exchange, promissory notes, or any other securities for money, are exempted from stamp duty.(o)

(f) *Harsard v. Robinson*, 7 B. & C. 90, E. C. L. R. vol. 14; 9 Dowl. & R. 860; *Powell v. Roach*, 6 Esp. 76; *Alexander v. Strong*, 9 M. & W. 733.*

(g) *Wain v. Bailey*, 10 Ad. & E. 616; E. C. L. R. vol. 37; 2 Per. & Dav. 507, S. C.

(h) According to the older authorities, the obligor of a single bond is not bound to pay without an acquittance under seal; otherwise of a bond with commission. Bro. Ab. tit. Faits, Pl. 8; 1 Vin. Ab. 192; Fortesc. Rep. 145.

(i) *Green v. Croft*, 2 H. Bla. 30; *Cole v. Blake, Peake*, N. P. C. 179.

(k) See 5 & 6 Vict. c. 82, same duty for Ireland.

(l) Per Ld. Ellenborough, *Burbridge v. Manners*, 3 Camp. 195.

(m) 55 Geo. 4, c. 184, sched. Receipts. A receipt may be explained. *Graves v. Key*, 3 B. & Ad. 313, E. C. L. R., vol. 23.

(n) *Maugham v. Hubbard*, 8 B. & C. 14, E. C. L. R. vol. 15; 2 Man. & R. 5.

(o) 55 Geo. 3, c. 184.

the holder, and do so credit it, the bill is *functus officio*, and cannot be further negotiated. *Savage v. Merle*, 5 Pick. 85.

Where a promissory note that has been negotiated comes into the possession of one of the parties liable to pay it, such possession is *prima facie* evidence of payment by him, and he is to be treated as the *bona fide* holder, unless the contrary is made to appear. *McGee v. Prouty*, 9 Metcalf, 547.

The possession of a bill by the drawee after maturity is *prima facie* evidence of payment. *Hill v. Gayle*, 1 Alabama, 275; *Fellows v. Kress*, 5 Blackford, 536.

A receipt on the back of a bill imports, *prima facie*, that it has been paid by the acceptor.(p)

A tender of part of the amount of an entire sum due on a bill or note, seems not to be good even *pro tanto*.(q)

A defendant, where there is a plea of payment (but not otherwise) is allowed to reduce the damages by the amount of payment established, though he be unable to prove the plea.(r) But if he plead that a note was given for a part only of the apparent consideration, and allege payment of that part, and on issue joined the plea is found against him, the plaintiff is entitled to a verdict for the full amount of the note.(s)

If the drawer discover, after payment, that the bill or check is a forgery, he may in general, by giving notice on the same day, recover back the money.(t) And if he have paid the bill with the understanding that he was to receive it back, and do not, he may bring an action to retract the payment.(u)

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*CHAPTER XVI.

OF SATISFACTION, EXTINGUISHMENT, AND SUSPENSION OF THE RIGHT OF ACTION ON A BILL.

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(p) *Pfiel v. Vanbatenberg*, 2 Camp. 439; *Scholey v. Walsby*, Peake, 25; *Graves v. Key*, *supra*.

(q) *Cotton v. Godwin*, 7 M. & W. 147; * *Hesketh v. Fawcitt*, 11 M. & W. 356.*

(r) It is said to have been doubted whether, in an action on a bill or note, a plea of part payment be good even *pro tanto*. Lord v. Ferrand, 13 L. J., Ex. 111. *Sed quære*, ante, p. 179.

(s) *Robins v. Lord Maidstone*, 4 Q. B. Rep. 811, E. C. L. R. vol. 45.

(t) See Chapter on *Forged Bills*.

(u) *Alexander v. Strong*, 9 M. & W. 733.* See also the Chapter on *Pleading*.

THE nature and effect of payment, in the ordinary sense of that word, has already been considered in the Chapter on PAYMENT. The nature and effect of such dealings with the acceptor, or other principal debtor, as discharge the drawer or indorser, is a subject of so much importance, that it will form the subject of a separate Chapter on SURETYSHIP. In the present Chapter, the reader's attention is requested to such observations only on satisfaction, extinguishment, and suspension, as do not properly fall within either of those two divisions.

A simple contract may be discharged before breach without a release and without satisfaction.(a)(1) But *after breach*, unless there be a release, there must be satisfaction.(b)

(a) Langden v. Stokes, Cro. Car. 383; Com. Dig. on the case in Assumpsit G., Conier and Holland's case, 2 Leo. 214; King v. Gillett, 7 M. & W. 55.*

(b) As to the waiver of an acceptance, see Chapter on *Acceptance*.

(1) This position is perhaps too broad. There are, it appears to me, two qualifications of it. First. The contract must be mutually executory, that is, the consideration executory on both sides. If the consideration on either side is executed, then the party cannot be bound by a mere nude agreement to release his right to performance. That right is a perfect one. Before it is thus complete by execution on his side, the contract is still nude as far as he is concerned, at least so far as this, that he cannot legally compel the execution of the stipulations of the other party. *Nudi consensus obligatio contrario consensu dissolvitur*, is the language of the Roman law. The cases cited as authority for the text are all of this character. Langden v. Stokes was the case of an agreement to go a certain voyage before a certain day. It was held that it could be dispensed with without consideration or seal. Conier and Holland's case is a very short and imperfect note; the nature of the contract is not stated. King v. Gillet was the case of mutual promises to marry. The principal other cases cited in Com. Digest is Triswaller v. Keyne, Cro. Jac. 619. That was an agreement that the plaintiff would travel and help the defendant to search for a will. In all cases of this character it seems a reasonable doctrine, that one party may dispense with the performance by the other without a seal and without consideration. But the second qualification, equally essential, is that this dispensation be accepted, or assented to, expressly or impliedly, by the other party. The original contract resting for its consideration upon mutual promises—mutual agreement to dispense is an equally good consideration for the rescission. It requires, therefore, neither a release nor satisfaction. It is certainly not in the power of one party to put an end to a contract, nor can one party, relying upon a naked dispensation of his part, insist upon the performance by the other of that of which the acts waived formed the sole consideration. In all the cases cited to sustain the text, the waiver before breach was held to put an end to the entire contract; to amount to a rescission of it. It is plain, then, that this doctrine can and ought to have no application to the contract arising upon a bill of exchange or

A satisfaction must be beneficial to the plaintiff.(c) It must come from the defendant or some one who represents him.(d)

[*183] *Payment by the debtor himself of a sum smaller than the debt, is no satisfaction.(e) But payment of a smaller sum by a third person has been held to be a discharge of the whole debt. The defendant was drawer of a bill for 18*l.* 3*s.* 11*d.*, and the plaintiff had taken from the defendant's father 9*l.* in satisfaction of the whole debt. The plaintiff, notwithstanding, afterwards sued the defendant for the balance. But Abbott, C. J., said, "If the father did pay the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's

(c) *Cumber v. Wane*, 1 *Stra.* 426; *Heathcote v. Crookshanks*, 2 *T. R.* 24.

(d) *Grymes v. Blofield*, *Cro. Eliz.* 541; *Edgecombe v. Rodd*, 5 *East*, 294; *Jones v. Broadhurst*, *C. P.*, *T. T.* 1850; and it must be fully executed. *James v. David*, 5 *T. R.* 141; *Bac. Ab.* 3; *Walker v. Seaborne*, 1 *Taunt.* 526. Mutual promises, with an immediate remedy on them, have, however, been considered a good accord and satisfaction. See *Com. Dig. Accord*, B. 4; *Cartwright v. Cooke*, 3 *B. & Ad.* 701, *E. C. L. R.* vol. 23; *Good v. Cheesman*, 2 *B. & Ad.* 328, *E. C. L. R.* vol. 22; but see *Bayley v. Homan*, 3 *Bing. N. C.* 915, *E. C. L. R.* vol. 32; 5 *Scott*, 94, *S. C.* Is not the distinction this? If the mere agreement were intended to be the satisfaction, it need not be executed; if its performance were intended as the satisfaction, it must be executed. See *Reeves v. Hearn*, 1 *Mees. & Wels.* 323; **Sard v. Rhodes*, 1 *Mees. & Wels.* 153; **Lewis v. Lyster*, 2 *C. M. & R.* 707.* In the Roman law, a stipulation by which a former obligation was taken away by the substitution of a new one was familiar. It was called *Novatio*. It exists at this day in the French law. (*Code Civil*, 1271.) *Novation* might be either without change of persons *sine delegatione*, or with a change of persons *cum delegatione*. There might be a change of the debtor's person *ex promissio*, or of the creditor's *cessio*.

(e) *Fitch v. Sutton*, 5 *East*, 230; unless the demand be unliquidated. *Wilkinson v. Byers*, 1 *Ad. & El.* 106, *E. C. L. R.* vol. 28; 3 *N. & M.* 853, *S. C.*; *Watters v. Smith*, 2 *B. & Ad.* 889, *E. C. L. R.* vol. 22; *Beaumont v. Greathead*, 2 *C. B. Rep.* 494, *E. C. L. R.* vol. 52.

promissory note. As between the original parties, if there is no consideration, it is still a nude pact, and there can be no recovery. If there is a consideration, or if the instrument is in the hands of a bona fide holder for value without notice, when it is in all respects as if there was a consideration, to hold that the vested and absolute right of the holder to performance at maturity could be waived without release or satisfaction, would be in the teeth of the best settled authorities and a legion of decided cases. If the other party paid back the consideration, then the contract might be rescinded, but that would be satisfaction. The contract by bill of exchange and promissory note, creates a *debitum in presenti solvendum in futuro*. On this subject, see *Ruggles v. Patten*, 8 *Mass.* 480; *Crawford v. Millspaugh*, 13 *Johns.* 87; *Champlin v. Butler*, 18 *Ibid.* 169, and the note by the American editors to the case of *Foster v. Dawbèr*, 6 *Welsby, Hurlstone & Gordon (Exchequer) Reports*, 838.

(See ante, p. 154, note 1.)

now recovering against the son, because, by suing the son, he commits a fraud on the father, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability.”(f)

So although a contract by the defendant himself to pay a smaller sum can be no satisfaction, unless it be negotiable ;(g) yet a contract by a third person to do so may be. Thus the taking a bill from one of two partners may operate as a satisfaction of the joint debt ; for the sole liability of one person may, in many instances, be more advantageous than his liability jointly with another.(h)

Relinquishing a suit, involving a doubtful point of law, may be a good satisfaction.(i)

*The acceptance of a *negotiable* security from the holder alone, may be a satisfaction even of a debt of larger [*184] amount.(k)

Where a bill or note, on which some person other than the debtor is liable, is expressly given and *accepted*,(l) in *full satisfaction and discharge*, the liability of the debtor for the original debt will not revive, on the dishonor of the substituted instrument.(m) But if it be taken generally on account, or in renewal, the original liability of the debtor revives on its dishonor.(n) If, in satisfaction of a note, a second note be given, and in satisfaction of the second note a third, the third note cannot be pleaded as given in satisfaction of the first.(o)(1)

(f) Welby v. Drake, 1 Car. & Payne, 557, E. C. L. R. vol. 12.

(g) Sibree v. Tripp, 15 M. & W. 23.*

(h) Thompson v. Percival, 5 B. & Ad. 925, E. C. L. R. vol. 27 ; 3 N. & M. 667, S. C.

(i) Longridge v. D'Orville, 5 B. & Ald. 117, E. C. L. R. vol. 7. See Edwards v. Baugh, 11 M. & W. 641 ;* Llewellyn v. Llewellyn, 15 L. J. 4, Q. B.

(k) Sibree v. Tripp, 15 M. & W. 23.*

(l) Hardman v. Bellhouse, 9 M. & W. 596.*

(m) Sard v. Rhodes, 1 Mees. & Wels. 153 ;* 1 Tyrw. & Gr. 298 ; 4 Dowl. 743 ; 1 Gale, 376, S. C.

(n) See post, Stedman v. Gooch, 1 Esp. 3 ; Kearslake v. Morgan, 5 T. R. 513.

(o) David v. Preece, 5 Q. B. Rep. 440, E. C. L. R. vol. 48.

(1) A bill of exchange or promissory note either of a debtor or any other person, is not payment of a precedent debt, unless it be so expressly agreed. Tobey v.

A warrant of attorney is not an extinguishment of the debt, as between the parties. "Till judgment is entered up," says Lord

Barber, 5 Johns. 68; McGinn v. Holmes, 2 Watts, 121; Weakly v. Bell, 9 Watts, 280; Johnson v. Weed, 9 Johns. 310; Higgins v. Packard, 2 Hall, 547; Coxe v. Hunkinson, Coxe, 85; Bill v. Porter, 9 Conn. 23; Sheehy v. Mandeville, 6 Cranch, 253; Chastain v. Johnson, 2 Bailey, 574; Porter v. Talcott, 1 Cowen, 359; Ayres v. Vanlieu, 2 Southard, 765; Sneed v. Wiesler, 2 A. K. Marshall, 277; Davidson v. Bridgeport, 8 Conn. 472; Gardner v. Gorham, 1 Dougl. 507; Weed v. Snow, 3 McLean, 265; Hays v. Stone, 7 Hill, 128; Kelsey v. Rosborough, 2 Richardson, 241; Steamboat v. Hammond, 9 Missouri, 59; Elwood v. Deifendorf, 5 Barb. S. C. 398.

In some states, however, the rule established is that such a bill or note is *prima facie* payment, unless the contrary appears. Reed v. Upton, 10 Pick. 522; Jones v. Kennedy, 11 Ibid. 125; Wood v. Bodwell, 12 Ibid. 268; Hutchins v. Olcott, 4 Vermont, 555; Trotter v. Crockett, 2 Porter, 401; Huse v. Alexander, 2 Metcalf, 157; French v. Price, 24 Pick. 13.

It is a question of fact, however, for the jury to determine in all cases the *quo animo* with which the security was given and accepted. Hart v. Boller, 15 Serg. & Rawle, 162; Bullen v. McGillcuddy, 2 Dana, 91; Gardner v. Gorham, 1 Dougl. 507.

A bill of exchange indorsed by the defendant in the suit for the accommodation of the drawer, and subsequently by the plaintiffs for the same purpose, was discounted at the instance of the *drawee*, and not being paid by *him*, was taken up by the *plaintiffs*, due notice being given to the defendants as first indorser. Subsequently, in order to reimburse the amount paid by the plaintiffs, a *note*, drawn by plaintiffs, was indorsed by the defendant, was discounted by a bank, and its proceeds remitted to the plaintiffs, and the amount was credited by their clerk on their books to the bill, on the account of the *drawer of it*. The *note* was taken up by the *drawer*. The act of the clerk was disaffirmed by the plaintiffs on discovering the entry in their books: it was held, that the discount of the *note* to raise money to take up the *bill* and the receipt by the plaintiffs of the amount of the *note*, was not an extinguishment of the liability of the defendant as first indorser of the bill of exchange, the *note* not being paid by him, but taken up by the plaintiffs, there being no evidence of an intention on the part of the plaintiffs to receive the *note* or its proceeds in satisfaction of the bill. Oliphant v. Church, 19 Penna. State Rep. 318.

Where a party, holding a contingent note, receives, in lieu thereof, a note for a smaller sum, payable absolutely, it is a good accord and satisfaction. Winslow v. Hardin, 3 Dana, 543.

If the vendor of goods received from the purchaser the note of a third person made payable to himself, and not indorsed or guaranteed by the purchaser, such note will be deemed to have been accepted by the vendor in full payment and satisfaction, unless the contrary be expressly proved. Whitbeck v. Van Nees, 11 Johns. 409.

If a promissory note be given for goods sold, the seller cannot recover on the original cause of action without producing the note or accounting for its loss. Hays v. McClurg, 4 Watts, 452.

Giving the creditor a bank check is not payment. Dennie v. Hart, 2 Pick. 204;

Ellenborough, "the warrant of attorney is merely a collateral security, and cannot merge the original debt."(*p*)

A bill indorsed in blank to one of several acceptors, and in his hands *when due*, cannot be afterwards transferred,(*q*) so as to confer on the transferee a remedy against any of the acceptors; for there has been that which is an equivalent to the performance of the contract.

Obtaining judgment on a bill or note is an extinguishment of the original debt, as between the plaintiff and defendant. But it alone, without actual satisfaction, is no extinguishment, as between the plaintiff and other parties, whether prior or subsequent to the defendant.(*r*) Nor is it an extinguishment, as between a party prior to the plaintiff, to whom the plaintiff after the judgment returns the bill, and the defendant.(*s*)

Nor does the issuing of execution against the person or goods *of one party to the bill, extinguish the plaintiff's remedy [*185] against other parties.

Nay, even the discharging of one party from execution under a *ca. sa.*, though it is a satisfaction as to him, and a discharge of those

(*p*) Norris v. Aylett, 2 Camp. 329.

(*q*) Steele v. Harmer, 15 L. J. 217, Exch.; 14 M. & W. 831.* As to this, see the judgment of the Court of Error; 19 L. J. 37, Exch.

(*r*) Bayley, 335; Claxton v. Swift, 2 Show. 441, 494; Lutwyche, 882; Skin. 255, S. C.

(*s*) Tarleton v. Allhusen, 2 Ad. & E. 32, E. C. L. R. vol. 29.

People v. Howell, 4 Johns. 296; Patton v. Ash, 7 Serg. & Rawle, 116; Cromwell v. Lovett, 1 Hall, 56; Franklin v. Vanderpoel, Ibid. 78; The People v. Baker, 20 Wendell, 602.

In general, payment in counterfeit notes or money is not good. Eagle Bank v. Smith, 5 Conn. 71; U. S. Bank v. Bank of Georgia, 10 Wheaton, 333; Markle v. Hatfield, 2 Johns. 455; Thomas v. Todd, 6 Hill, 340; Anderson v. Hawkins, 3 Hawks. 568; Ramsdale v. Horton, 3 Barr, 330.

Payment in the bills of an insolvent bank is not a satisfaction of a debt, although, at the time and place of payment, the bills are in full credit and the parties are wholly ignorant of such insolvency, if the bank was in fact insolvent. Ontario Bank v. Lightbody, 13 Wendell, 101; Wainwright v. Webster, 11 Vermont, 576; Thomas v. Todd, 6 Hill, 340; Watson v. McLaren, 19 Wend. 557.

Contra. Lowrey v. Murrell, 2 Porter, 280; Bayard v. Shunk, 1 Watts & Serg. 92; Scruggs v. Gass, 8 Yerger, 175.

parties to the bill who are his sureties thereon,(t) is no extinguishment of the liability of other parties.(u)

Waiving a *fieri facias* against the goods of a party, does not discharge any other party.(v)

Taking a security of a higher nature, as a deed, though it extinguish the simple contract debt on the bill, as between the parties to the substitution, has no effect on the liability of the other distinct parties to the bill.(w) Indeed, if the specialty were given and accepted as a collateral security only, even the liability on the bill, of the party giving it, may remain unaffected.(x)

Where a bill is renewed, holding the original bill, and taking the substituted one, operates as a suspension of the debt till the substituted bill is at maturity.(y) And although the second bill for the principal sum should be paid, the plaintiff may recover interest due on the original bill at the time when the second was given, by bringing an action on the original bill, unless it appear that the second bill was intended to operate as a renewal, or satisfaction of the whole of the former bill.(z) If the second bill be discharged, by an alteration, an action may be brought on the first.(a)

If, as we have seen, a debtor on a bill takes out administration to his deceased creditor, that is a suspension of the right of action.(b)

[*186] *A covenant not to sue for a limited time will not suspend the right of action,(c) but will only create a right to sue for the breach of covenant. No more will a subsequent, or even a contemporaneous, but collateral, agreement on good consideration not to sue for a limited time on a bill or note.(d)

(t) See Chapter on *Indulgence*, post, p. 189.

(u) *Hayling v. Mulhall*, 2 Bla. 1235; *English v. Darley*, 2 Bos. & Pul. 61; 3 Esp. 49, S. C.; *Clark v. Clement*, 6 T. R. 525; *Mayhew v. Crickett*, 2 Swanst. 190.

(v) *Pole v. Ford*, 2 Chitty, Rep. 125.

(w) Bayley 6th ed. 334, Bac. Ab. Extinguishment, D.

(x) *Bedford v. Deakin*, 2 B. & Ald. 210; 2 Stark. 178, E. C. L. R. vol. 3, S. C.

(y) *Kendrick v. Lomax*, 2 Crompt. & Jer. 405; * 2 Tyr. 438, S. C. See *Ex parte Barclay*, 7 Ves. 597; *Bishop v. Rowe*, 3 M. & Sel. 362; *Dillon v. Rimmer*, 1 Bing. 100, E. C. L. R. vol. 8; 7 Moore, 427, S. C.

(z) *Lumley v. Musgrave*, 4 Bing. N. Ca. 9, E. C. L. R. vol. 33; 5 Scott, 230, S. C.; *Lumley v. Hudson*, 4 Bing. N. Ca. 15, E. C. L. R. vol. 33; 5 Scott, 238, S. C.

(a) *Sloman v. Cox*, 1 C. M. & R. 471; * 5 Tyrw. 174, S. C.

(b) Ante, p. 42.

(c) *Thimbleby v. Barron*, 3 Mees. & W. 210.*

(d) *Ford v. Beech*, 11 Q. B. 842, E. C. L. R. vol. 63; *Webb v. Spicer*, 19 L. J., Q. B. no 35, error.

*CHAPTER XVII.

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OF RELEASE.

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AN express release, *relaxatio*, is an acquittance under the seal of the releasor. Being a deed, no consideration is essential to its validity.(a)

A release by the holder after the maturity of the bill, is a complete discharge as between the releasor and his transferees on the one hand, and the releasee on the other. Its effect on other parties will be considered when we come to the subject of principal and surety.

But a premature release, *i. e.* a release before the bill is due, though good as between the parties, will not discharge the releasee from the claim of an indorsee for value, who took the bill before it was due, without notice of the release.(b)

And a release, whether before or after the maturity of the bill, is good *as between the parties*, although the releasor be not at the time of the release the holder of the bill.(c)

But a release of a drawee before acceptance is inoperative.(d)

A release *by* one of several joint creditors is a release by all.

(a) As to the discharge of contract before breach, see the preceding Chapter.

(b) *Dod v. Edwards*, 2 C. & P. 602, E. C. L. R. vol. 12.

(c) *Scott v. Lifford*, 1 Camp. 246; 9 East, 347, S. C. If an acceptor plead a release, it must appear by his plea that the bill had been accepted before the release was given. *Ashton v. Freestun*, 2 M. & G. 1, E. C. L. R. vol. 40; 2 Scott, N. R. 273, S. C.

(d) *Drage v. Netter*, 1 Ld. Ray. 65; *Hartley v. Manton*, 5 Q. B. Rep. 247, E. C. L. R. vol. 48; and see *Ashton v. Freestun*, *supra*.

[*188] *And a release to one of several joint contractors is in law a release of all.(e) Therefore, a release of one of two joint acceptors or joint indorsers, is a release to both.

A release of one of several joint debtors, who are *severally*, as well as *jointly*, liable, is equally a release to all, for judgment and execution against one would have been a discharge to all.(f)

But it has been held, that the legal operation of a release as to parties jointly liable, may in some cases be restrained by the terms of the instrument.(g) But it cannot be defeated by a mere parol agreement.(h)

A covenant not to sue, amounts in law to a release. But though it may be pleaded as a release by the party to whom it is given, it does not so far operate as to discharge another person jointly liable.(i) Nor will a covenant not to sue given by one of two joint creditors operate as a release.(j)

A covenant not to sue for a limited time, though (as we shall hereafter see) it discharges sureties, does not, *as between the parties*, effect a release, or even a suspension of the action.(k)

We have already seen(l) that the creditor's appointment of his debtor as executor, amounts in law to a release. And that the same consequence follows if one or several debtors is appointed executor.

(e) Co. Litt. 232, a.; Nicholson v. Revill, 4 Ad. & Ell. 675, E. C. L. R. vol. 31; 6 N. & M. 192; 1 Har. & W. 753, S. C. So a release of one of several joint trespassers is a release of all, Lit. s. 376.

(f) Solly v. Forbes, 2 B. & B. 38, E. C. L. R. vol. 6; Ex parte Gifford, 6 Ves. 808; but see Nicholson v. Revill, 4 Ad. & E. 675, E. C. L. R. vol. 31; 6 N. & M. 192; 1 Har. & W. 753, S. C.

(g) Brooks v. Stuart, 1 Per. & D. 615; 9 Ad. & E. 854, E. C. L. R. vol. 36, S. C.; Cocks v. Nash, 9 Bing. 341, E. C. L. R. vol. 25.

(h) 2 Rol. Ab. 412; Lacy v. Kynaston, 2 Salk. 575; 2 Saund. 47, t.; Cheetham v. Ward, 1 B. & P. 630; Nicholson v. Revill, ubi supra, n, (e); Brooks v. Stuart, 9 Ad. & E. 854, E. C. L. R. vol. 36; 1 Per. & D. 615, S. C.

(i) Dean v. Newhall, 8 T. R. 168; Hutton v. Eyre, 6 Taunt. 289, E. C. L. R. vol. 1.

(j) Walmsley v. Cooper, 11 Ad. & Ellis, 216, E. C. L. R. vol. 39; 3 Per. & Dav. 149, S. C.

(k) Thimbleby v. Barron, 3 M. & W. 210.*

(l) Apte, p. 41.

The release of a debt is a release of the right to hold any securities that may have been given for the debt.(m)

*CHAPTER XVIII.

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OF THE LAW OF PRINCIPAL AND SURETY IN ITS APPLICATION
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A PARTY liable on a bill sometimes bears to the holder the relation of principal debtor, sometimes of surety only.

It is a general rule of law, that a discharge of the principal is a discharge to the surety. For the engagement of the surety, being but an accessory to the principal's agreement, terminates with it. If, notwithstanding this release of the principal debtor, the creditor could sue the surety, he would evade the effect of his discharge to the principal, and regain a *debt which he may have relinquished for a valuable consideration, or by his deliberate act and deed. [*190]

(m) Cowper v. Green, 7 M. & W. 633.*

Besides, were the surety obliged to pay the creditor, he must either be allowed to resort to his principal, or he must not. If he may, then the principal will lose the benefit of that discharge which he received from the creditor; if he may not, the loss occasioned by the creditor's stipulation with the principal will fall on the surety. Further, it is a doctrine of equity that the surety is entitled to all the remedies which the creditor has against the principal. It is evident, from these considerations, that the only rational and equitable rule is, that which is well established both in law and equity, namely, that a discharge to the principal is a discharge to the surety.

In inquiring into the effect of a discharge or indulgence by the holder, to parties liable on a negotiable instrument, let us consider,—1st. What parties to a bill or note are principals, and what parties are sureties; 2dly. What arrangements between the holder and the principal debtor will discharge the surety; 3dly. How the discharge of the surety may be prevented; 4thly. How it may be waived; and 5thly. What conduct of the creditor to the surety will discharge the principal debtor.

First. What parties to a bill are principals, and what parties are sureties.

Suppose the bill to have been accepted and indorsed for value. The acceptor is the principal debtor, and all the other parties are sureties for him, liable only on his default.

But though the other parties are, *in respect to the acceptor*, sureties only, they are not, *as between themselves*, merely co-sureties, but each prior party is a principal in respect of each subsequent party. For example, suppose a bill to have been accepted, and afterwards indorsed by the drawer and by two subsequent indorsers to the holder. As between the holder and the acceptor the acceptor is the principal debtor, and the drawer and indorsers are his sureties. But as between the holder and the drawer, the drawer is the principal debtor, and the indorsers are his sureties. As between the holder and the second indorser, the second indorser is the principal, and the subsequent or third indorser is his surety. A discharge, therefore, to the prior parties, the principals, is a discharge to the subsequent parties, the sureties; but a discharge to the subsequent parties, the sureties, is not a discharge to the prior parties, the principals.(1)

(1) Where a bill of exchange is drawn by one person upon another, and a third party subscribes his name under that of the drawer, adding the word "surety" to

Where a bill is payable to the order of a third person, the payee is a subsequent party, and so a surety for the drawer. He stands in the same situation as the first indorsee and *second indorser [*191] of a bill drawn payable to the indorser's order.(a)

It follows, therefore, that a discharge to the acceptor is a discharge of all the parties to the bill; for, if they were still liable, they could either sue the acceptor or they could not. If they could, the discharge to the acceptor would be frustrated; if they could not, they must pay the bill without a remedy over, which would extend their liability beyond their contract. So, a discharge to an indorser is no discharge of the prior indorsers, for they have no remedy against the discharged indorser; but it is a discharge of the subsequent indorsers, for if the holder could notwithstanding recover against them, and they could recover against the prior discharged indorser, his discharge would be frustrated; if they could not, they must pay the bill without a remedy over.(b)

It was formerly held, that where a bill was accepted without consideration for the accommodation of the drawer, the drawer was to be considered the principal debtor, and the acceptor as his surety; and, therefore, that the time given to the drawer would discharge the acceptor,(c) but time given to the acceptor would not discharge the drawer.(d) But this distinction has since been overruled;(e) and *in Courts of Law* the acceptor, in all cases of accommodation bills as well as others, is considered as the principal debtor, though the holder, at the time of making the agreement, or even of taking the bill, knew the acceptance to have been without value.(f)(1)

(a) *Claridge v. Dalton*, 4 M. & Sel. 226.

(b) *Smith v. Knox*, 3 Esp. 36; *Claridge v. Dalton*, 4 M. & Sel. 232; *Hall v. Cole*, 6 Nev. & M. 124, E. C. L. R. vol. 36; 4 Ad. & El. 577; 1 Har. & W. 722, S. C.

(c) *Laxton v. Peat*, 2 Camp. 185; see *Yallop v. Ebers*, 1 B. & Ad. 698, E. C. L. R. vol. 20.

(d) *Collott v. Haigh*, 4 Camp. 281.

(e) *Fentum v. Pocock*, 5 Taunt. 192, E. C. L. R. vol. 1; 1 Marsh. 14, S. C.; *Carstairs v. Rolleston*, 5 Taunt. 551, E. C. L. R. vol. 1; 1 Marsh. 207, S. C.

(f) "I think," says Parke, J. "that the decision in *Fentum v. Pocock*, was good

his signature, the undertaking of such third party is with the payee or subsequent holder, that the bill shall be accepted and paid, but he incurs no obligation to the drawees. *Griffith v. Reid*, 21 Wend. 502.

(1) *Walker v. Bank of Montgomery*, 12 Serg. & Rawle, 382; *Lewis v. Hanchman*, 2 Barr, 416; *Hansborough v. Gray*, 3 Grattan, 356; *Stiles v. Eastman*, 1 Kelly, 205.

As the acceptor is at law in all cases the principal debtor on a bill, so the maker is at law the principal debtor on a note, though it be given by the maker to the payee without *consideration, (g) [*192] and the holder take it with notice of absence of consideration. (h)

The indorsers of a note severally stand, as principals or sureties, in the same situation as the indorsers of a bill.

When of a joint and several note one maker is in reality principal and the other surety, it is doubtful whether, in any case, evidence is admissible at law to show that one is principal and the other is surety; and, consequently, that the surety is discharged by time given to the principal. (i) But such evidence is admissible in equity.

sense and good law." *Price v. Edmunds*, 10 B. & C. 578, E. C. L. R. vol. 21; *Harrison v. Courtauld*, 2 B. & Ad. 36, E. C. L. R. vol. 22; *Nichols v. Norris*, 3 B. & Ad. 41, E. C. L. R. vol. 23. The doctrine laid down in *Fentum v. Pocock*, has, however, been doubted in equity by Lord Eldon. *Ex parte Glendinning*, Buck. 517; *Bank of Ireland v. Beresford*, 6 Dow. 233; and by the late Master of the Rolls, Sir John Leach. An accommodation acceptor who pays the creditor is, it seems, entitled to all instruments and securities given by the principal debtor. *Dowbiggin v. Bourne*, You. Rep. 115.

(g) *Carstairs v. Rolleston*, 5 Taunt. 551, E. C. L. R. vol. 1; 1 Marsh. 207, S. C.

(h) *Nichols v. Norris*, 3 B. & Ad. 41, E. C. L. R. vol. 23.

(i) *Price v. Edmunds*, 10 B. & C. 578, E. C. L. R. vol. 21; *Perfect v. Musgrave*, 6 Price, 111. But evidence to that effect has been admitted. *Garratt v. Jull*, 1 S. N. P. 9th ed. 387; *Hall v. Wilcox*, 1 M. & Rob. 58. In *Clarke v. Wilson*, 3 M. & W. 208,* it was intended to have raised the question, but on demurrer to defendant's plea judgment was given for the plaintiff. The question, therefore, whether one of two makers of a joint and several promissory note can show by parol that he is liable as surety only, was not decided. In *Rees v. Berrington*, 2 Ves. jun. 540, Lord Loughborough says, that "where two are bound jointly and severally, the surety cannot aver by pleading that he is bound as surety." See *Ashbee v. Pidduck*, 1 M. & W. 564,* and *Thompson v. Clubley*, 1 M. & W. 212.* But, in equity, a surety may aver and prove that he was only a surety, though the bond was joint and several. *Heath v. Key*, 1 Y. & J. 434;* *Nisbett v. Smith*, 2 Bro. C. C. 581; *Skip v. Hucy*, 3 Atk. 91. The authorities are contradictory; but, on principle, it should seem that, at law at least, such evidence is inadmissible as against the creditor; for it is parol evidence to make a written contract conditional, which, on the face of it, is absolute. The evidence does not show absence of consideration, as in the case of an accommodation acceptance. Besides, the introduction of such evidence might affect an innocent indorsee with stipulations of which he had no notice. But it should further seem, that when the question arises not between the creditor and his debtors, but between those debtors themselves, which was principal and which was surety, parol evidence is admissible at law, as in such case it clearly is in equity. *Craythorne v. Swinden*, 14 Vesey, 170; see p. 6.

Secondly. As to what transactions between the creditor and the principal debtor will discharge the surety.

The creditor must not conceal from the surety any stipulation in the original contract, disadvantageous to the principal debtor. Such concealment is a fraud, and releases the surety.^(j)

The holder is not obliged to use active diligence in order to [*193] *recover against the acceptor.^(k) He may defer suing him as long as he pleases; he may even promise not to press him, or not to sue him. Thus, where the executrix of an acceptor verbally promised to pay the holder out of her own estate, provided he would forbear to sue, and he forbore accordingly, it was held that, the agreement being invalid under the Statute of Frauds, the drawer was not discharged.^(l)

But, if the holder once destroy or suspend, or contract to destroy or suspend, his right of action against the acceptor, the drawer and indorsers are at once discharged, unless the agreement giving time contain a stipulation that the holder shall, in case of default, have *judgment* at a period as early as he could have obtained judgment if hostile proceedings had continued.^(m) But if the agreement contain no stipulation that a judgment shall be given, it is not necessary to aver in a plea disclosing such an agreement, that the time within which the plaintiff might have obtained judgment was postponed.⁽ⁿ⁾ That it was not must either be specially replied, or may possibly (if the form of the averment in the plea admits of it) be proved under a traverse of an actual forbearance.⁽¹⁾

(j) *Pidcock v. Bishop*, 3 B. & C. 605, E. C. L. R. vol. 10; 5 D. & R. 505, S. C.; *Mayhew v. Crickett*, 2 Swan. 193; *Stone v. Compton*, 5 Bing. N. Ca. 142, E. C. L. R. vol. 35; 6 Scott, 816, S. C.; *Jackson v. Duchaire*, 3 T. R. 551; *Cecil v. Plaistow*, 1 Ans. 202; *Middleton v. Lord Onslow*, 1 P. Wms. 768; *Brown v. Wilkinson*, 13 M. & W. 14.*

(k) *Orme v. Young*, Holt, N. P. 84; *Eyre v. Everest*, 2 Russ. 381; 3 Mer. 278; *Trent Navigation v. Harley*, 10 East. 34.

(l) *Philpot v. Briant*, 4 Bing. 717, E. C. L. R. vol. 13; 1 M. & P. 754; 3 C. & P. 214, S. C.

(m) *Kennard v. Knott*, 4 M. & Gr. 474, E. C. L. R. vol. 43; *Michael v. Myers*, 6 M. & Gr. 702, E. C. L. R. vol. 46.

(n) *Kennard v. Knott*, 4 M. & Gr. 474, E. C. L. R. vol. 43; *Isaac v. Daniel*, 15 L. J. 149, Q. B.; 8 Q. B. Rep. 500, E. C. L. R. vol. 55.

(1) If the holder of a bill or note do anything, the effect of which is to suspend or impair or destroy the right of the prior parties to indemnity from those still before them, he cannot resort to the parties thus affected by his conduct. *Couch v. Waring*, 9 Conn. 261; *Wood v. Jefferson County Bank*, 9 Cowen, 194; *Okie v. Spencer*, 2

Payment by the principal of course discharges the surety.

The acceptor is bound to pay on the day the bill or note falls due, and therefore he cannot plead in his own discharge a subsequent tender.(o) But it has been held that an indorser has a reasonable time within which to pay the bill; and if he pay, or tender payment, within a reasonable time, and before writ issued, *perhaps* he discharges himself.(p) And, therefore, payment by the acceptor or maker, though after the note has been dishonored, if within a reasonable time, or with interest, and before action brought against the indorser, or a tender of such payment, though it would not discharge himself, would, it should seem, discharge the indorser.

A release to the acceptor or maker discharges the indorsers.

(o) *Hume v. Peploe*, 8 East, 168.

(p) *Walker v. Barnes*, 5 Taunt. 240, E. C. L. R. vol. 1; 1 Marsh. 36, S. C.; *Soward v. Palmer*, 2 Moo. 294; 8 Taunt. 277, E. C. L. R. vol. 4; but see *Siggers v. Lewis*, 1 C. M. & R. 370; * 4 Tyr. 847; 2 Dowl. 681, S. C.; ante, p. 176.

Wharton, 253; *Bank v. Hanrick*, 2 Story, 416; *Newcomb v. Rayner*, 21 Wend. 108; *Hawkins v. Thompson*, 2 McLean, 111; *Woodman v. Eastman*, 10 N. Hamp. 359.

Mere indulgence or delay, however, will not have that effect. There is no obligation to use due diligence, as is generally the case against a principal in order to hold a surety liable, at least where the surety calls upon the creditor to act. *Bank v. Myers*, 1 Bailey, 412; *Powell v. Waters*, 17 Johns. 176; *Worsham v. Goar*, 4 Porter, 441; *Stafford v. Yates*, 18 Johns. 327; *Sterling v. Marietta Co.*, 11 Serg. and Rawle, 179; *State Bank v. Wilson*, 1 Devereux, 484; *Foreman's Bank v. Rollins*, 1 Shepley, 202; *Page v. Webster*, 3 Shepley, 249; *Pierce v. Whitney*, 1 Shepley, 113; *Bank of Utica v. Ives*, 17 Wend. 501.

In some states, however, due diligence must be used, and the same principles are applied as between principal and surety in ordinary cases. *Lee v. Love*, 1 Call, 497; *Bronaugh v. Scott*, 5 Call, 78; *Smallwood v. Woods*, 1 Bibb, 542; *Perrin v. Broadwell*, 3 Dana, 596; *Horton v. Frink*, 5 Day, 530; *Huntington v. Harvey*, 4 Conn. 124; *Treadway v. Drybread*, 4 Blackford, 20; *Bishop v. Yeazle*, 6 Ibid. 127; *Pillard v. Darst*, 6 Missouri, 358; *Kilpatrick v. Heaton*, 3 Brevard, 92; *Richetson v. Wood*, 10 Missouri, 547; *Bostor v. Walker*, 4 Gilman, 3; *Hopper v. Sisk*, 1 Smith, 102.

If the holder of a promissory note be called upon by the indorser, after the note has become due, to prosecute the maker, of whom the amount might then be collected, but who afterwards becomes insolvent, and he neglects so to do, this will not discharge the indorser. *Trimble v. Thorne*, 16 Johns. 152; *Beebe v. West Branch Bank*, 7 Watts & Serg. 375.

The acceptance by the holder of a judgment against the maker, and time given thereon, will not discharge the indorser if the time so given be not greater than would have elapsed, had a suit been brought and pursued with diligence. *Sizer v. Heacock*, 23 Wend. 81.

So will a general covenant not to sue, for that will enure as *a release;(q) so a covenant not to sue within a particular time,(r) though it do not in law amount to a release or suspend [*194] the action.(s)

So also will a release in law. If the holder makes the acceptor his executor, the indorsers are discharged.(t)

A written or verbal agreement, on good consideration, not to sue the acceptor at all, or not to sue him within a specified time, discharges the indorsers; but if such agreement be without consideration, or otherwise void in law, the indorsers are not discharged.(u)(1)

The taking of a new bill from the acceptor, payable at a future day, discharges the indorsers.(v)

(q) Com. Dig. Release.

(r) *At law*, a parol agreement by the creditor not to sue the principal is no discharge to the surety of a liability he has contracted by deed: *Davey v. Pendergrass*, 5 B. & Al. 187, E. C. L. R. vol. 7, recognized in *Price v. Edmunds*, 10 B. & C. 582, E. C. L. R. vol. 21; *Buldeel v. Jarrold*, 8 Price, 467; *Cocks v. Nash*, 9 Bing. 346, E. C. L. R. vol. 23; 2 M. & Sc. 434, S. C.; sed vide *Archer v. Hale*, 4 Bing. 464, E. C. L. R. vol. 13; 1 M. & P. 285, S. C.; but, *in equity* the creditor's giving time to the principal, although by a parol agreement, is a discharge to the surety of a liability created by deed. *Rees v. Berrington*, 2 Ves. Jun. 540; *Buldeel v. Jarrold*, 8 Price, 467; et vide *Combe v. Woolf*, 8 Bing. 161, E. C. L. R. vol. 21; 1 M. & Sc. 241, S. C.; *Bowmaker v. Moore*, 3 Price, 214; 7 Price, 228. As to circumstances under which a Court of equity will interfere, see *Heath v. Key*, 1 Y. & J. 434.* But a covenant not to sue upon a simple contract for a limited time, this is not pleadable in bar to an action on the contract against the principal debtor. *Thimbleby v. Barron*, 3 Mees. & W. 210.*

(s) Quære, as to the effect of indulgence as to part of the sum due. See *Mayhew v. Cricket*, 2 Swanst. 189.

(t) Ante, pp. 41, 42.

(u) *Arundel Bank v. Goble*, K. B. 1817; *Chitty*, 9th ed. 413; 2 *Chitty's Rep.* 335, S. C.; *Wilson v. Whitaker*, 2 Marsh. 383, E. C. L. R. vol. 4; 7 Taunt. 53, S. C.; *Brickwood v. Annis*, 5 Taunt. 614, E. C. L. R. vol. 1, 1 Marsh. 250, S. C.; *Philpot v. Briant*, 4 Bing. 717, E. C. L. R. vol. 13; 1 Moo. & P. 754; 3 C. & P. 244, S. C.

(v) *Gould v. Robson*, 8 East, 576; *English v. Darley*, 2 B. & P. 62; 3 Esp. 49, S. C.

(1) A gratuitous agreement by the holder of a bill with the acceptor made on the last day of grace to look to him alone for the payment, and not to present the bill or notify the drawer, does not relieve the drawer if the protest is made and notice given. *De Witt v. Bigelow*, 11 Alabama, 480. An agreement to give time must be legally binding on the holder in order to discharge the indorsers. *Bagley v. Buzzell*, 1 App. 88; *Low v. Underhill*, 3 McLean, 376; *Lockwood v. Crawford*, 18 Conn. 361; *Chute v. Patlee*, 37 Maine, 102.

Discharging the acceptor or a prior indorser from execution, discharges the other indorsers; (*w*) but discharging a *subsequent [195] indorser from execution affords no defence to a prior indorser. (*x*) A second execution against the same debtor, who has been once discharged, is not absolutely void, and therefore a man may be taken again if he has so agreed. (*y*)

Part payment by the principal or by the surety will not discharge the surety. (*z*) (1)

A mere offer to give time to the acceptor not acted upon, will not discharge the drawer. (*a*)

The taking a cognovit or warrant of attorney from the acceptor, though payable by instalments, will not discharge the indorsers, provided the last instalment be not postponed beyond the period when,

(*w*) "It is," says Lord Eldon, "a question fit to be tried at law, whether, if a party takes out execution on a bill of exchange, and afterwards waives that execution, he has not discharged those who were sureties for the due payment of the bill. The principle is, that he is a trustee of his execution for all parties interested in the bill." *Mayhew v. Crickett*, 2 Swanst. 190.

But it has been decided, that the withdrawing of an execution against the goods of an acceptor will not discharge such drawer, and that the rule, that giving indulgence to an acceptor without the consent of the drawer discharges such drawer, does not apply after judgment. *Pole v. Ford*, 2 Chitty, 126; *Bray v. Manson*, 8 M. & W. 668;* but see *English v. Darley*, 2 B. & P. 62; 3 Esp. 49, S. C. It is conceived that when the obligation of a surety is pursued to judgment, he is, at law, no longer surety, but an absolute debtor, yet that equity, regarding the substance and not the form of his obligation, may consider him still a surety, entitled to all the securities which the creditor holds, and perhaps discharged by indulgences to the principal. Vide *Bray v. Manson*, *ubi supra*.

(*x*) *Hayling v. Mulhall*, 2 Bl. 1235. In the marginal note of this case, the words "prior" and "subsequent" are transposed. See *English v. Darley*, 2 B. & P. 62; 3 Esp. 49, S. C.

(*y*) *Atkinson v. Bayntun*, 1 Bing. N. C. 444, E. C. L. R. vol. 27; 1 Scott, 404, S. C.

(*z*) *Walwyn v. St. Quentin*, 1 B. & P. 652; 2 Esp. 515, S. C.

(*a*) *Hewet v. Goodrick*, 2 C. & P. 468, E. C. L. R. vol. 12; *Badnall v. Samuel*, 3 Price, 521.

(1) The holder is not obliged to receive part payment from the maker. *Jennings v. Shrive*, 5 Blackford, 37.

Contra; *Hightown v. Joy*, 2 Porter, 308.

in the ordinary course of the action, judgment and execution might have been had.(b)

The obtaining of a judgment against any one party, without satisfaction, is no discharge of any other party.(c)

If the acceptor is a bankrupt, the holder may prove and receive a dividend under the commission, for the acceptor is, in case of bankruptcy, discharged, not by the act of the holder, but by act of law.

Upon the same principle, if the acceptor, being charged in execution at the suit of the indorsee, is discharged under the Insolvent Act, the indorsee has his remedy against the drawer.(d)

*But if the holder voluntarily accepts a composition, the [*196] indorsers are discharged.(e)

Though the taking of a fresh bill from the acceptor in lieu of the dishonored bill, discharges the other parties, it will not have the effect, if the second bill or second security, whatever it be, were given as a collateral security.(1) Where a bill having been dishonored, the acceptor transmitted a new bill for a larger amount to the payee,

(b) Jay v. Warren, 1 C. & P. 532, E. C. L. R. vol. 12; and see Lee v. Levy, 6 Dowl. & R. 475, E. C. L. R. vol. 16; 4 B. & C. 390; 1 C. & P. 553, S. C.; Hulme v. Coles, 2 Simon, 12; Stevenson v. Roche, 9 B. & C. 707, E. C. L. R. vol. 17; Price v. Edmunds, 10 B. & C. 578, E. C. L. R. vol. 21.

(c) Claxton v. Swift, 2 Show. 441-494; 1 Lutw. 878.

(d) See the Chapter on *Discharge under the Acts for the Relief of Insolvent Debtors*; Nadin v. Battie, 5 East, 147; 1 Smith, 362, S. C.; and see English v. Darley, 2 B. & P. 62; 3 Esp. 49, S. C. If a creditor execute a deed of composition, having indorsed away bills on the debtor, the deed is no defence to an action on the bills when they are returned to the creditor. Margetson v. Aitken, 3 C. & P. 338, E. C. L. R. vol. 14; Dans. & Ll. 157, S. C. Where a man has been discharged from a debt on a note under the Insolvent Act, a new note for the old debt will not bind, though given to procure time for a surety on the old note. Evans v. Williams, 1 C. & M. 30; 3 Tyr. 226, S. C.

(e) Ex parte Wilson, 11 Ves. 412; Ex parte Smith, Co. B. L. 189; Ellison v. Dezell, 1 S. N. P. 9th ed. 365.

(1) If the holder of a note receives a bond and warrant of attorney from the maker, for the purpose of entering judgment thereon and increasing his security, the bond and warrant will be considered only as collateral security, and the indorser will not be thereby discharged. Mohawk Bank v. Van Horne, 7 Wendell, 117.

but had not any communication with him respecting the first, and the payee discounted the second bill and indorsed the first to the plaintiff; it was held, that the second bill was merely a collateral security, and that the receipt of it by the payee did not amount to giving time to the acceptor of the first bill, so as to exonerate the drawer. "In cases of this description," says Abbott, C. J., "the rule laid down is, that if time be given to the acceptor, the other parties to the bill are discharged; but in no case has it been said, that taking a collateral security from the acceptor shall have that effect. Here the second bill was nothing more than a collateral security."(*f*) B., being indebted to A., procured C. to join with him in giving a joint and several promissory note for the amount, and afterwards, having become further indebted, and being pressed by A. for further security, by deed reciting the debt, and that for a part a note had been given by him and C., and that A. having demanded payment for the debt, B. had requested him to accept a further security, assigned to A. all his household goods, &c., as a further security, it was held, that this did not affect the remedy on the note against C.(*g*) So, where one of the three partners, after a dissolution of partnership, undertook by deed made between the partners to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills, the separate notes having [*197] proved unproductive, it was held, that he might *still resort to his remedy against the other partners, and that the taking under these circumstances, the separate notes, and even afterwards renewing them several times, did not amount to satisfaction of the joint debt.(*h*)

Where a contract is entered into by the holder with a stranger, which, if made with the acceptor, would have discharged the indorser, it has been suggested, that the acceptor's assent to a contract for his benefit may be presumed.(*i*)

(*f*) *Pring v. Clarkson*, 1 B. & C. 14, E. C. L. R. vol. 8; 2 Dowl. & R. 78. See the observations on this case, Bayley, 6th ed. 347.

(*g*) *Twopenny v. Young*, 3 B. & C. 308, E. C. L. R. vol. 10; 5 Dowl. & R. 259, S. C.

(*h*) *Bedford v. Deakin*, 2 B. & Al. 210; 2 Stark. 178, S. C.

(*i*) See *Lyon v. Holt*, 5 M. & W. 250, *sed quære*.

Though the drawee should not have accepted the bill, yet it is conceived that the holder, by giving up the bill to him and taking from him a substituted bill at a longer date, would discharge the prior parties, though he have given due notice of dishonor. It is true, the drawee is not the principal debtor, nor at law a debtor to the holder at all, but he is the debtor of the drawer: and, if a man be referred to his debtor's debtor for payment, and instead of taking cash elects to take a bill, he discharges his former debtor.^(k) If, however, the holder being unable to obtain cash, takes a bill from the drawee as a collateral security, and keeps the original bill, it is conceived that his remedies on the original bill would not be affected, and that, as between himself and the drawer, there would be a good consideration for the new bill.^(l)

A warrant of attorney is only a collateral security.^(m)

Thirdly, as to the means by which the discharge of the principal may be prevented from operating as a discharge to the surety.

It has been repeatedly held, and is now well established, that a discharge by the creditor to the principal debtor will not discharge the surety, if there be an agreement between the creditor and the principal that the surety shall not be thereby discharged.⁽ⁿ⁾ Albeit the surety himself is no party to the stipulation; and the surety's remedy over against the principal *is intact whether the surety [*198] be or be not a party,^(o) unless the instrument amount to a release of one of several joint or joint and several debtors.^(p) But this stipulation must appear on the face of the instrument giving time, and cannot if the indulgence be in writing, be proved by parol.^(q)

No indulgence to an acceptor or other prior party will discharge

(k) Strong v. Hart, 9 D. & R. 189, E. C. L. R. vol. 22; 6 B. & C. 160; Smith v. Ferrand, 7 B. & C. 19, E. C. L. R. vol. 14; 9 D. & R. 803; but see Robinson v. Read, 9 B. & C. 449, E. C. L. R. vol. 17; 4 M. & R. 349, S. C.

(l) Vide the Chapter on *Consideration, Debt of a Third Person*, p. 96.

(m) Norris v. Aylett, 2 Camp. 329.

(n) Burke's case, 6 Ves. 809; Boulton v. Stubbs, 18 Ves. 20; Ex parte Glendinning, Buck, 517; Ex parte Carstairs, Ibid. 560; Harrison v. Courtauld, 3 B. & Ad. 36, E. C. L. R. vol. 23; Nichols v. Norris, Ibid. 41, n.; Cowper v. Smith, 4 M. & W. 519; * Smith v. Winter, 4 M. & W. 454.*

(o) Kearsley v. Cole, 16 M. & W. 128.*

(p) Ibid. It is not unusual to insert in the original contract of suretyship a stipulation, that a composition with the principal shall not release the surety. See Cowper v. Smith, 4 M. & W. 519.*

(q) Ubi supra.

an indorser, if he previously consent to it. Thus, where the acceptor, having been arrested by the holder, offered him a warrant of attorney for the amount of the bill, payable by instalments, and, the holder mentioning the offer to the drawer, the drawer said, "You may do as you like, for I have had no notice of the non-payment;" it was held, that this amounted to an assent, and that the drawer (who, in fact, had had notice), was not discharged by the indulgence.(*r*)

Lastly, as to the mode in which the operation of indulgence to the principal on the liability of the surety may be waived.

Wherever the surety, with knowledge of the facts, assents either by words or acts to what has already been done, such subsequent assent will be a waiver of his discharge without any new consideration.(*s*) Therefore, where time had been given, and the drawer, aware of the fact, but ignorant of the law, and conceiving himself still liable, said, "I know I am liable, and if the acceptor does not pay it I will," the drawer was held to have waived his discharge.(*t*) But where a bill was renewed, and an indorsee said, "It was the best thing that could be done," it was held, that this was no recognition of his liability.(*u*)

If the principal and sureties are jointly liable, *e. g.* if they are joint makers of a note, then a discharge to a surety by the creditor releasing him, or making him executor, or taking from him a composition and erasing his name from the note, will be a discharge of the [**199*] co-surety, and also of the principal debtor;(v) *but the discharge, in this case, does not proceed on the law of principal and surety.

If one who is surety on a joint and several note, signed by the principal, pay the amount, though without any request or compulsion by the creditor, he may recover it of the principal.(w)

Where the sureties are not, as between themselves, principal and

(*r*) *Clark v. Devlin*, 3 B. & P. 363.

(*s*) *Mayhew v. Crickett*, 2 Swanst. 185; *Smith v. Winter*, 4 M. & W. 467.*

(*t*) *Stevens v. Lynch*, 12 East, 38; 2 Camp. 332, S. C.; *Smith v. Winter*, 4 M. & W. 454.*

(*u*) *Withall v. Masterman*, 2 Camp. 179; *Clark v. Devlin*, 3 B. & P. 363; *Tindal v. Brown*, 1 T. R. 167; *English v. Darley*, 2 B. & P. 61.

(*v*) *Nicholson v. Revill*, 4 Ad. & E. 675, E. C. L. R. vol. 31; 6 N. & M. 192; 1 Har. & W. 753, S. C.

(*w*) *Pitt v. Purssord*, 8 M. & W. 538.*

surety, as a prior and subsequent indorser of a bill or note are, but merely co-sureties, as two or more joint, or joint and several, makers of a note, if one be called on to pay the whole debt, the other shall severally contribute in equal proportions.

And though the same debt be secured by different instruments, executed by different sureties, and though one portion of the debt be secured by one instrument, and one by another, and different sureties execute each, still there is mutual contribution.(x)

A surety has a right of action against his co-surety as soon as he has paid his proportion of the debt;(y) but he has a fresh right of action against the principal for every sum that he pays.

The proper legal remedy for a surety who has paid more than his due proportion of the debt against his co-surety, is an action for money paid to the use of the co-surety.(z)

The right of a surety to contribution from his co-surety, is not prejudiced by the plaintiff possessing a security against the principal debtor which the defendant does not possess, and of which he was not aware.(a)

If a surety pay money to the creditor under a mistake as to the facts supposed to constitute his liability, he may recover it back.(b)

*CHAPTER XIX.

[*200]

OF PROTEST AND NOTING.

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WHEN a foreign bill is refused acceptance or payment, it was and still is necessary, by the custom of merchants, in order to charge the

(x) *Deering v. Earl of Winchelsea*, 2 Bos. & P. 270; *Mayhew v. Crickett*, 2 Swanst. 184.

(y) *Davies v. Humphreys*, 6 M. & W. 153; * *Cowell v. Edwards*, 2 B. & P. 268; *Browne v. Lee*, 6 B. & C. 689, E. C. L. R. vol. 13.

(z) *Kemp v. Finden*, 12 M. & W. 421.*

(a) *Done v. Whalley*, 17 L. J. 225, Exch.; 2 Exch. Rep. 198,* S. C.

(b) *Mills v. Alderbury Union*, 3 Exch. 590.*

drawer, that the dishonor should be attested by a protest.(a) For, by the law of most foreign nations,(b) a protest is, or was, essential in case of dishonor of any bill; and, though by the law of England it is unnecessary, in the case of an inland bill, yet, for the sake of uniformity of international transactions, a foreign bill must be protested.(c)(1) Besides, a protest affords satisfactory evidence of dishonor to the drawer, who, from his residence abroad, might experience a difficulty in making proper inquiries on the subject, and be compelled to rely on the representation of the holder. It also furnishes an indorsee with the best evidence to charge an antecedent party abroad; for foreign Courts give credit to the acts of a public functionary, in

(a) *Gale v. Walsh*, 5 T. R. 239; *Rogers v. Stephens*, 2 T. R. 713; *Orr v. Maginnis*, 7 East, 359; 3 Smith, 328, S. C.

(b) Poth. 217.

(c) See *Brough v. Perkins*, 1 Salk. 131; 2 Ld. Raym. 993; 6 Mod. 80, S. C.; and the argument in *Trimby v. Vignier*, 1 Bing. N. Ca. 151, E. C. L. R. vol. 27; 4 M. & Sc. 955; 6 C. & P. 25, S. C., as to a protest of a French bill payable in France.

(1) Demand and protest must be made according to the laws of the place where the bill is made payable. *Ellis v. Commercial Bank*, 7 Howard, Miss. 294; *Carter v. Union Bank*, 7 Humph. 548; *Grafton Bank v. Moore*, 14 N. Hamp. 142.

Where the drawee of a bill of exchange residing in New York, wrote a letter there to the drawer, residing in Massachusetts, accepting the bill which was drawn in the latter State, it was held that the contract of acceptance was made in New York, and was governed by the law of that State; and the bill must be presented there to the acceptor for payment. *Worcester Bank v. Wells*, 8 Metcalf, 107.

Protest is necessary in case of a foreign bill, in order to charge the drawer or indorser. *Payne v. Winn*, 2 Bay. 376; *Union Bank v. Hyde*, 6 Wheaton, 572; *Duncan v. Course*, 1 Rep. Const. Ct. 100; *Read v. The Bank of Kentucky*, 1 Monroe, 91; *Carter v. Burleigh*, 9 N. Hamp. 558; *Nelson v. Fotherly*, 7 Leigh, 173.

But a protest of an inland bill is unnecessary, unless as in some States it is made necessary by statute to the recovery of damages. *Union Bank v. Hyde*, 6 Wheaton, 572; *Miller v. Hackley*, 5 Johns. 375; *Payne v. Winn*, 2 Bay, 376; *Young v. Bryan*, 6 Wheaton, 146; *Taylor v. Bank of Illinois*, 7 Monroe, 579; *Bank of United States v. Leathers*, 10 B. Monroe, 64; *Lawrence v. Ralston*, 3 Bibb, 102; *Murry v. Clayborn*, 2 Ibid. 300; *McMarchey v. Robinson*, 10 Ohio, 496; *Hubbard v. Troy*, 2 Iredell, 134; *Bailey v. Dozier*, 6 Howard, U. S. 23; *Smith v. Ralston*, 1 Morris, 87; *Turner v. Greenwood*, 4 English, 44.

It is not necessary to protest a promissory note. *Payne v. Winn*, 2 Bay, 374; *City Bank v. Cutter*, 3 Pick. 414; *Young v. Bryan*, 6 Wheat. 146; *Smith v. Little*, 10 N. Hamp. 526; *Bay v. Church*, 15 Conn. 15; *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Evans v. Gordon*, 8 Porter, 142; *Smith v. Gibbs*, 2 Smedes & Marshall, 479; *Platt v. Drake*, 1 Doug. 296.

the same manner as a protest under the seal of a foreign notary is evidence in our Courts of the dishonor of a bill payable abroad.(d)

But a protest is not necessary on a foreign promissory note.(e)

The protest should be made by a notary public; but, if there be no such notary in or near the place where the bill is *payable, it may be made by an inhabitant, in the presence of two witnesses.(f)(1) [*201]

A notary, *registrarius*, *actuarius*, *scrinarius*, was anciently a scribe, that only took *notes* or minutes, and made short drafts of writings and other instruments, both public and private. He is at this day a public officer of the civil and canon law, appointed by the Archbishop of Canterbury, who, in the instrument of appointment, decrees, "that full faith be given, as well in as out of judgment, to the instruments by him to be made." (g) This appointment is also registered and subscribed by the clerk of her Majesty for faculties in Chancery. The present act for the regulation of notaries is the 41 Geo. 3, c. 79.(h) By the 11th section of this statute, any person acting for reward as a notary, without being duly admitted, forfeits 50*l.* to him that will sue for the same.

By the 6 Geo. 4, c. 87, s. 20, her Majesty's consuls at foreign ports or places are empowered to do all notarial acts.

And, by 3 & 4 Wm. 4, c. 70, attorneys residing more than ten miles from the Royal Exchange may be admitted to practise as notaries.

The protest of a foreign bill should be begun, at least (and such an incipient protest is called noting), on the day on which acceptance or payment is refused;(i) but it may be drawn up and completed at any

(d) Anon.; 12 Mod. 345; Rep. temp. Holt, 297.

(e) See Bonar v. Mitchell, 19 L. J. Exch. 302.

(f) Bayley, 210.

(g) Ayliffe's Parergon, 385; 3 Burn's Eccl. Law, 1.

(h) And see 6 & 7 Vict. c. 90.

(i) B. N. P. 272.

(1) A demand of payment of a note may be made by a clerk of the notary. *Sussex Bank v. Baldwin*, 2 Harrison, 487.

The notary who fills up and certifies the protest must present the bill himself; it cannot be done by an agent. *Carmichael v. Pennsylvania Bank*, 4 Howard, Miss. 567; *Sacridor v. Brown*, 3 M'Lean, 481; *Chenoweth v. Chamberlin*, 6 B. Monroe, 60; *Bank of Kentucky v. Garey*, Ibid. 626; *Carter v. Union Bank*, 7 Humph. 548.

time before the commencement of the suit,(*k*) or even before the trial,(*l*) and antedated accordingly. An inland bill cannot be protested for non-payment till the day after it is due.(*m*)(1)

A protest is usually made where the dishonor occurred.(*n*) The 2 & 3 Wm. 4, c. 98, enacts that a bill made payable by the drawer at a place other than the drawee's residence, and which bill shall not be accepted on presentment, shall be, without further presentment, protested for non-payment in the place where it has been made payable.(*o*)

[*202] A protest is, in form, a solemn declaration, written by the *notary under a fair copy of the bill, stating that payment or acceptance has been demanded and refused, the reason, if any, assigned, and that the bill is therefore protested. When the protest is made for a qualified acceptance, it must not state a general refusal to accept, otherwise the holder cannot avail himself of the qualified acceptance.(*p*)(2)

A protest is subject to stamp duty according to the following scale :(*q*)—

	£	s.	d.
On a bill or note not amounting to 20 <i>l.</i> ,	0	2	0
Amounting to 20 <i>l.</i> , and not amounting to 100 <i>l.</i> ,	0	3	0
Amounting to 100 <i>l.</i> , and not amounting to 500 <i>l.</i> ,	0	5	0
Amounting to 500 <i>l.</i> , or upwards,	0	10	0

(*k*) *Chaters v. Bell*, 4 Esp. 48; *Selw.* 9th ed. 360, S. C.; but see *Vandewell v. Tyrrell*, M. & M. 87, where there is payment for honor.

(*l*) *Bul. N. P.* 272; *Orr v. Magennis*, 7 East, 361; *Thompson on Bills*, p. 147.

(*m*) 9 & 10 Wm. 3, c. 17.

(*n*) See *Mitchell v. Baring*, 10 B. & C. 4, E. C. L. R. vol. 21; M. & M. 381; 4 C. & P. 35, S. C.

(*o*) See the Statute in the *Appendix*.

(*p*) *Bentinck v. Dorrien*, 6 East, 199; 2 Smith, R. 337, S. C.; *Sproat v. Matthews*, 1 T. R. 182.

(*q*) 55 Geo. 3, c. 184, Sched. Protest.

(1) A protest is properly made on the last day of grace. *Battertons v. Porter*, 2 Litt. 388; *Mills v. Rouse*, *Ibid.* 207; *Ontario Bank v. Petrie*, 3 Wend. 456.

If the last day of grace be Sunday, protest should be made on Saturday. *Offutt v. Stout*, 4 J. J. Marsh. 332.

(2) When the protest of a bill of exchange contained an exact copy of the bill, but the acceptance was made by "Chas. Byrne," instead of "And. E. Byrne," as it was in the original bill, this variance or error in the name of the acceptor's agent ought not to have excluded the protest from being read in evidence to the jury. *Dennistown v. Stewart*, 17 Howard, 606.

Besides the protest for non-acceptance and for non-payment, the holder may protest the bill for better security. Protest for better security is where the acceptor becomes insolvent, or where his credit is publicly impeached before the bill falls due. In this case, the holder may cause a notary to demand better security; and, on its being refused, the bill may be protested, and notice of the protest may be sent to an antecedent party. Yet, it seems, the holder must wait till the bill falls due before he can sue any party. Nor does there appear any advantage from the protest more than from simple notice of the circumstances;(r) except that, after such protest, there may be a second acceptance for honor.(s) Whereas, without the intervention of a protest, there cannot be two acceptances on the same bill.(t)

Noting is a minute made on the bill by the officer at the time of refusal of acceptance or payment. It consists of his initials, the month, the day, the year, and his charges for minuting;(u) and is considered as the preparatory step to protest. "Noting," says Mr. J. Buller, "is unknown in the law, as distinguished from the protest: it is merely a preliminary step to the protest, and has grown into practice within these few years."(v) A bill, however, is often noted, where no protest is either meant or contemplated, as in the case of many inland bills. The use of it seems to be, that a notary being a person conversant in such transactions, is qualified to *direct [*203] the holder to pursue the proper conduct in presenting a bill, and may, upon a trial, be a convenient witness of the presentment and dishonor. In the meantime, the minute of the notary, accompanying the returned bill, is satisfactory assurance of non-payment or non-acceptance, to the various parties by whom the amount of the bill may be successively paid. In case of an inland bill, as it can only be protested under the statute, and the fees of a notary for protesting are thereby fixed at 6*d.*, it has been said, that no more can be charged for noting,(w) though it is usual to charge more.(x)

The Court will not allow the expense of noting to be recovered

(r) Anon. 1 *Ld. Raym.* 743; *Chitty*, 9th ed. 343; *Mar.* 110.

(s) *Ex parte Wackerbath*, 5 *Ves.* 574.

(t) *Jackson v. Hudson*, 2 *Camp.* 447.

(u) *Kyd*, 87.

(v) *Leftley v. Mills*, 4 *T. R.* 170.

(w) *Ibid.*; *Chitty*, 9th ed. 465.

(x) *Vide Appendix.*

against the acceptor,(y) unless it be laid as special damage in the declaration.(1)

If the drawer reside abroad, a copy, or some memorial of the protest, ought to accompany the notice of dishonor.(z) But notice of the protest certainly is not necessary, if the drawer resides within this country, though, at the time of non-acceptance, he may happen to be abroad;(a) nor if, at the time of dishonor, he have returned home to this country. "If," says Lord Ellenborough, "the party is abroad, he cannot know of the fact of the bill having been protested, except by having notice of the protest itself; but, if he be at home, it is easy for him, by making inquiry, to ascertain that fact."(b)

And it is now decided that a *copy* of the protest need not in any case be sent.(c)(2)

Proof of a protest of a foreign bill is excused, if the drawer had no effects in the hands of the drawee, and no reasonable expectation that the bill would be honored;(d) or if the drawer has admitted his liability, by promising to pay. "By the drawer's promise to pay," observes Lord Ellenborough, "he admits the existence of everything which is necessary to render him liable. When called upon for payment of the bill, he ought to have objected that there was no protest. Instead of that, he promises to pay it. I must, therefore, presume [*204] he *had due notice, and that a protest was regularly drawn up by a notary."(e)

(y) *Hobbs v. Christmas*, Sittings after Mms. T. 1831; *Kendrick v. Lomax*, 2 C. & J. 405;* 2 Tyr. 438, S. C.; see post.

(z) *Bayley*; Poth. 148; *Robins v. Gibson*, 1 M. & S. 288, vide supra, Chap. on *Notice of Dishonor*.

(a) *Cromwell v. Hynson*, 2 Esp. 511.

(b) *Robins v. Gibson*, 1 M. & Sel. 288; 3 Camp. 334, S. C.

(c) *Goodman v. Harvey*, 4 Ad. & E. 870, E. C. L. R. vol. 31; 6 N. & M. 372, S. C.

(d) *Legge v. Thorpe*, 12 East, 171; 2 Camp. 310, S. C.

(e) *Gibbon v. Coggon*, 2 Camp. 188; *Patterson v. Beecher*, 6 Moore, 319; *Greenway v. Hindley*, 4 Camp. 52.

(1) If the acceptor of a bill fail to pay it at maturity, so that it is necessary to protest it, in order to charge the drawer and indorser with damages, the acceptor is liable to refund the notarial fees. *Tichner v. Branch Bank*, 3 Alabama, 135.

(2) It is unnecessary that a copy of the protest of a foreign bill should be included in the notice. *Dennistown v. Stewart*, 17 Howard, 606.

And it is said, that where the drawer adds a request or direction, that in the event of the bill not being honored by the drawee, it shall be returned without protest, by writing the words, "*retour sans protêt*," or "*sans frais*," a protest as against the drawer, and perhaps as against the indorsers, (*f*) is unnecessary.

Inland bills may be protested for non-payment under the 9 & 10 Wm. 3, c. 17, and for non-acceptance under the 3 & 4 Anne, c. 9. But it has been held, that a protest is unnecessary, except to enable the holder to recover interest; (*g*) and subsequent and uniform practice, confirmed by a late decision, (*h*) has settled that it is superfluous even for this purpose. (*l*)

Foreign bills are very frequently protested, both for non-acceptance and non-payment: but a protest is hardly ever made for non-acceptance of an inland bill, though it is sometimes protested for non-payment. (*i*) (*2*) It is conceived, that a protest of an inland bill is unknown to the common law, and must, therefore, derive its efficacy from the above enactments; from which it will follow, that it is applicable only to such instruments as are therein described, and that the steps therein required must be taken. As the 3 & 4 Anne, c. 9, puts promissory notes on the same footing as bills, it should seem to authorize a protest: and such protest is accordingly sometimes made. (*k*) It would, therefore, be no practical benefit further to discuss the provisions of these two loosely drawn and obscure statutes, with respect to the protest of inland bills.

The loss of a bill is no excuse for the absence of protest. (*l*)

In an action against the drawer of a foreign bill, protest must be

(*f*) 1 Pardessus, 540; Chitty, 9th ed. 165.

(*g*) Harris v. Benson, 2 Stra. 910.

(*h*) Windle v. Andrews, 2 B. & Al. 696; 2 Stark. 425, S. C.

(*i*) Kyd, 95; 2 & 3 Wm. 4, c. 98.

(*k*) Kyd, 97.

(*l*) Pothier, 145.

(1) Protest for non-payment is not necessary to charge the acceptor with the principal sum; but if no other evidence of a demand is given, a protest is necessary to charge him with interest. Lang v. Brailsford, 1 Bay. 222.

(2) When a protest for non-acceptance as well as non-payment is necessary, see Brown v. Barry, 3 Dall. 368; Clarke v. Russell, Ibid. 424; Read v. Adams, 6 Serg. & Rawle, 356; Lenox v. Leverett, 10 Mass. 5; Duncan v. Course, 1 Rep. Const. Ct. 103; Phillips v. McCurdy, 1 Har. & Johns. 187; Thompson v. Cumming, 2 Leigh, 321; Martin v. Ingersoll, 8 Pick. 1; Chase v. Taylor, 4 Har. & J. 54; Fleming v. McClure, 1 Brevard, 428.

averred(*m*) as well as proved; and it has been held, that, if protest of an inland bill be set forth in pleading, it *must be proved.(*n*) [*205] But this decision proceeded on the ground that an allegation of protest of an inland bill involved a consequential claim for interest and costs; whereas it has since been decided, that such a claim may be made without protest.(*o*)

In an action on a foreign bill, presented abroad, the dishonor of the bill will be proved by producing the protest, purporting to be attested by a notary public; or, if there is not any notary near the place, purporting to have been made by an inhabitant, in the presence of two witnesses.(*p*) But a protest made in England is not evidence of the presentment here.(*q*)(1)

A promise to pay is good *prima facie* evidence of protest,(*r*) and of notice thereof.(*s*)

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*CHAPTER XX.

OF ACCEPTANCE SUPRA PROTEST, OR FOR HONOR.(*a*)

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WHEN acceptance is refused, and the bill is protested for non-acceptance, or where it is protested for better security, any person may

(*m*) But the absence of the allegation of protest is a defect of form only. *Salomons v. Stavely*, 3 Doug. 298; *Gale v. Walsh*, 5 T. Rep. 239; *Armani v. Castrigue*, 13 M. & W. 443.*

(*n*) *Boulager v. Talleyrand*, 2 Esp. 550.

(*o*) *Windle v. Andrews*, 2 B. & Al. 696; 2 Stark. 425, E. C. L. R. vol. 3, S. C.

(*p*) *Anon.* 12 Mod. 345; Rep. Temp. Holt, 297, S. C.

(*q*) *Chesmer v. Noyes*, 4 Camp. 129.

(*r*) *Patterson v. Beecher*, 6 Moore, 319; *Gibbon v. Coggon*, 2 Camp. 188; *Campbell v. Webster*, 15 L. J. 4, C. P.; 2 C. B. Rep. 258, E. C. L. R. vol. 52, S. C.; *Greenway v. Hindley*, 4 Camp. 52.

(*s*) *Ibid.*

(*a*) Called in French, "Acceptation par Intervention," Code de Commerce, 126.

(1) A statement in a protest of a bill for non-acceptance, that the reason given by the drawee for non-acceptance was that he had no effects of the drawer, is no evidence of the want of effects. *Dumont v. Pope*, 7 Blackford, 367.

The notarial certificate is sufficient proof of the dishonor of a foreign bill. *Brydon v. Taylor*, 2 Harr. & Johns. 399; *Nicholls v. Webb*, 8 Wheat. 333; *Townsley v. Sumrall*, 2 Peters, 179; *Lonsdale v. Brown*, *Ibid.* 688; *Chanvine v. Fowler*, 3 Wendell, 173; *Bank v. Pursley*, 3 Monroe, 238; *Chase v. Taylor*, 4 Har. & Johns. 54.

accept it, *supra protest*, (b) for the honor of the drawer, or of any one of the indorsers. The method of accepting, *supra protest*, is said to be as follows, viz.: the acceptor, *supra protest*, must personally appear before a notary public, with witnesses, and declare that he accepts such protested bill in honor of the drawer or indorser, as the case may be, and that he will satisfy the same at the appointed time; and then he must subscribe the bill with his own hand, thus—"Accepted, *supra protest*, in honor of A. B.," &c.; (c) or, as is more usual "Accepts, S. P." And a general acceptance, *supra protest*, which does not express for whose honor it is made, is considered as made for the honor of the drawer. (d)

Any person may accept a bill *supra protest*: and the drawee himself, though he may refuse to accept the bill generally, *may [*207] yet accept it *supra protest*, for the honor of the drawer or of an indorser. (e) And, though we have seen that, after one general acceptance, there cannot be another acceptance, (f) yet, when a bill has been accepted, *supra protest*, for the honor of one party, it may by another individual, be accepted, *supra protest*, for the honor of another. (g) In no one case is the holder obliged to take an acceptance for honor. (h) (1)

(b) I am not aware of any authority to show that there may be an acceptance for honor without a protest, and the statute 6 & 7 Wm. 4, c. 19, seems to assume that bills accepted for honor are always protested; and see *Vandewall v. Tyrrell*, M. & M. 87; *Bayley*, 6th ed. 181. Unless, indeed, there be a direction to another person in case of need. *Chitty*, 165, 236. Where the direction, in case of need, is appended by the drawer, it is said to be necessary to present a *foreign* bill to that other person. But then he is more properly an original alternative drawee than an acceptor for honor. As to a direction "in case of need" on an indorsement, see *Leonard v. Wilson*, 2 C. & M. 589.* There seems from that case no *obligation* to present an inland bill (where the direction in case of need is given by an indorser) to the party to whom in case of need it may be presented.

(c) *Beawes*, pl. 38.

(d) *Chitty*, 9th ed. 344; *Beawes*, 39.

(e) *Beawes*, 33.

(f) *Jackson v. Hadson*, 2 Camp. 447.

(g) *Beawes*, pl. 42.

(h) *Mutford v. Walcott*, 12 Mod. 410; 1 Ld. Raym. 575, S. C.; *Beawes*, 37; *Gregory v. Walcup*, Comb. 67; *Pillans v. Van Mierop*, 3 Bur. 1663.

(1) A stranger to the drawer and indorser of a bill may intervene *supra protest*, and accept. And it is no objection to such intervention (and does not impair such acceptor's remedy against the party for whom he intervenes), that it is done at the request and under the guarantee of the drawee. *Konig v. Bayard*, 1 Peters, 250.

The holder of a dishonored bill, who is offered an acceptance for the honor of some one of the preceding parties to the bill, should first cause the bill to be protested, and then to be accepted, *supra protest*, in the manner above described. At maturity he should again present it to the drawee for payment, who may, in the meantime, have been put in funds by the drawer for that purpose. If payment by the drawee be refused, the bill should be protested a second time for non-payment: *(i)* and then presented for payment to the acceptor for honor. *(k)* Doubts having arisen as to the day when the bill should be again presented to the acceptor for honor, or referee, in case of need for payment, the 6 & 7 Wm. 4, c. 58, enacts, that it shall not be necessary to present, or in case the acceptor for honor or referee live at a distance, to forward for presentment, till the day following that on which the bill becomes due. *(l)*

In a late case, which has attracted much attention, it was proved, [*208] *that where a foreign bill, drawn upon a merchant residing in Liverpool, payable in London, is refused acceptance, the usage is to protest it for non-payment in London. The bill is put into the hands of a notary, and he formerly used to make protest at the Royal Exchange, but that custom is obsolete; the notary now is merely desired by the holder to seek payment of the bill, and on a declaration by the holder that the drawee has not remitted any funds, or sent to say where the bills will be paid, the notary at once marks it as protested for non-payment. The Court (with the exception perhaps of Mr. J. Bayley) seemed to think this might, if the bill were payable

(i) Hoare v. Cazenove, 16 East, 391.

(k) Williams v. Germaine, 7 B. & C. 477, E. C. L. R. vol. 14; 1 M. & R. 394, S. C.

(l) According to the French law the acceptor for honor is bound to give notice to the person for whose honor he accepts. "L'INTERVENANT EST TENU DE NOTIFIER SANS DELAI SON INTERVENTION A CELUI POUR QUI IL EST INTERVENU," Code de Commerce, 127: "Parceque autrement," says Rogron, "le tireur, ignorant ce qui est arrivé, pourrait envoyer la provision au tiré: l'observation de cette disposition donne lieu à des dommages-intérêts contre l'accepteur par intervention si le tireur en éprouve quelque prejudice." But according to Beawes, pl. 47, any one accepting a bill, *supra protest*, for the honor of the drawers or indorsers, though without their order or knowledge, has his remedy against the person for whose honor he accepted. It seems, that according to the Scotch law, a holder may take an acceptance *supra protest*, and yet sue the drawer or indorsers. Thompson, 489. Such is certainly the French law: "*Le porteur de la lettre de change conserve tous ses droits contre le tireur et les endosseurs à raison du défaut d'acceptation par celui sur qui la lettre était tirée, nonobstant toutes acceptations par intervention.*" Code de Commerce, 128.

in London, be, in ordinary cases, sufficient. But they were all agreed that it would not have been sufficient in the principal case to charge the acceptor supra protest, because the acceptance was in these words — "*If regularly protested and refused when due ;*" and they said the drawees could not be said to refuse, unless they were asked. The Court also appear to have been clear, that though there might be cases in which an exhibition of the bill to a notary in London is sufficient, yet that in all cases a bill *may* be sent to the drawee, and indeed that such is the more regular course.^(m)(1)

By the 2 & 3 Wm. 4, c. 98, it is enacted, that all bills made payable by the drawee in any place other than his residence, are, on non-acceptance, to be protested without further presentment for non-payment in the place where they are made payable.

The undertaking of the acceptor supra protest, is not an absolute engagement to pay at all events, but only a collateral conditional engagement to pay, if the drawee do not. "It is," says Lord Ellenborough, "an undertaking to pay, if the original drawee, upon a presentment to him for payment, should persist in dishonoring the bill, and such dishonor by him be notified, by protest, to the person who has accepted for honor."⁽ⁿ⁾ The learned Judge proceeds to lay down the doctrine that a second protest is necessary; observing: "The use and convenience, and, indeed, the necessity of a protest upon foreign bills of exchange, in order to prove, in many cases, the regularity of the proceedings thereupon, is too obvious to warrant us in dispensing with such an instrument in any case where the custom of merchants, as reported in the authorities of law, appears to have required it."^(o) And a *second protest, for non-payment [*209] by the drawee, is, after acceptance supra protest, equally necessary, in order that either the holders may charge the acceptor

^(m) Mitchell v. Baring, 10 B. & C. 4, E. C. L. R. vol. 21; M. & M. 381; 4 C. & P. 35, S. C.

⁽ⁿ⁾ Hoare v. Cazenove, 16 East, 391. See Vandewall v. Tyrrel, M. & M. 87.

^(o) Ibid.

(1) Where a draft has been protested for non-acceptance, the holder is not bound to present it at maturity for payment. Exeter Bank v. Gordon, 8 New Hamp. 66. But this is not where there has been an acceptance supra protest. An acceptor for the honor of the drawer cannot recover against him without proof of a presentment for acceptance or payment, and refusal and notice to the drawer. Baring v. Clark, 19 Pick. 220.

He who accepts *supra protest* is not liable unless demand of payment is made on the drawee, and notice of his refusal given. Schofield v. Bayard, 3 Wendell, 491.

supra protest, or the acceptor supra protest may charge the party for whose honor the acceptance was given. The object of an acceptance for honor is to save to the holder all those rights which he would have enjoyed, had the bill been accepted in a regular manner. If the bill be drawn payable at a certain period after sight, and accepted supra protest, a second presentment for payment, and protest and notice, is still essential, for the purpose of enabling the holder to sue either drawer or acceptor supra protest, or enabling the latter to sue the party for whose honor he has accepted. And the time which the bill has to return is computed, not from the date of the exhibition to drawee, but from the date of the acceptance supra protest.(p) Presentment to the drawee, and protest, must be averred in the declaration.(q) The acceptor supra protest, becomes liable to all parties on the bill subsequent to him for whose honor the acceptance was made.(r)

By acceptance supra protest, the party for whose honor it was made, and all parties antecedent to him, become liable to the acceptor supra protest, for all damages which he may incur by reason of his acceptance.(s) The acceptor supra protest, where the bill has been protested for better security, has his remedy also against the acceptor ;(t) but, in case of bankruptcy of both drawer and acceptor, if the acceptance were for the accommodation of the drawer, the acceptor supra protest must first resort to the drawer's estate.(u) But(v) it has been since held that, in such a case, a party paying for the honor of the drawer supra protest, has no claim on the assignees of the acceptor, because the drawer himself had none.(1)

(p) *Williams v. Germaine*, 7 B. & C. 468, E. C. L. R. vol. 14 ; 1 Man. & R. 394, 403, S. C.

(q) *Ibid.*

(r) *Hoare v. Cazenove*, 16 East, 391 ; *Bayley*, 6th ed. 178 ; *Beawes*, 33 ; *Marius*, 21 ; *Ex parte Wackerbath*, 5 Ves. 574.

(s) *Beawes*, 47.

(t) *Ex parte Wackerbath*, 5 Ves. 574.

(u) *Ibid.*

(v) *Ex parte Lambert*, 13 Ves. 179.

(1) If a third party takes up a bill at its maturity for the honor of the drawer, and at his request, he thereby releases the accommodation acceptor of such bill, whether he intended it or not. *McCowell v. Cook*, 6 Smedes & Marshall, 420.

*CHAPTER XXI.

[*210]

OF PAYMENT SUPRA PROTEST, OR FOR HONOR.

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PAYMENT *supra protest*, is where a bill of exchange, having been protested for non-payment, is paid by another person, for the honor of some one of the parties. Any party to a bill of exchange, whether drawer, drawee, payee, or indorser, may pay for honor. So may a *mere stranger* without any previous request or authority from the party for whose honor he pays. This right is not founded on the English common law, but is a provision of the general law merchant introduced to aid the credit and circulation of bills of exchange. It extends to no other instrument. It is said that such payment should be preceded, on the part of the payer, in the presence of a notary public, by a declaration for whose honor the bill is paid, which should be recorded by the notary, either in the protest or in a separate instrument.(a) It is clear that there can be no payment for honor till the bill is dishonored by non-payment;(b) and a protest was held by Lord Tenterden to be essential.(c)

A party paying a bill of exchange, *supra protest*, has his action against the party for whom the payment was made, and against all other parties to whom that party could have resorted for reimbursement.(d) But he thereby discharges all the intervening parties.(e)(1)

(a) Beawes, pl. 53; Marius, 128. L'intervention et le paiement seront constatés dans l'acte de protêt ou à la suite de l'acte. Code de Commerce, Art. 158.

(b) Deacon v. Stodhart, 2 Man. & Gr. 317, E. C. L. R. vol. 40.

(c) Vandewall v. Tyrrell, 1 M. & M. 87, E. C. L. R. vol. 22. As it is by the French law, Code de Commerce, Art. 158, and by the law of Scotland, Bell's Comm. b. 3, part 1, c. 4, s. 367.

(d) Bayley, 6th ed. 318.

(e) Celui qui paie une lettre de change par intervention est subrogé aux droits du porteur * * * Si le paiement par intervention est fait pour le compte du tireur tous les endosseurs sont libérés. S'il est fait pour un endosseur, les endosseurs subsequents sont libérés. Code de Commerce, Art. 159.

(1) An acceptor *supra protest* for the honor of the first indorser, may require as a condition of payment that the holder shall indorse the bill to him. Freeman v. Perot, 2 Wash. C. C. 485.

[*211] *A man paying for honor of an indorser may, if he choose, give immediate notice to the prior indorsers, but he is not bound so to do. He may, if he please, send the protest, or the bill, or notice, to the party for whose honor he pays, and subsequent regular notice given by that party, (f) will suffice.

It is conceived that a man cannot, by paying supra protest, revive the liability of an indorser already discharged by laches.

And where a party pays a bill generally for honor, without a protest, he, as an indorsee, may sue any party on the bill. (g)

The party paying supra protest, has also his remedy against the acceptor, (h) but not if it were an accommodation acceptance; at least, if the acceptance supra protest were for the honor of the drawer. (i)

It is necessary that the protest should be made before payment. (k)

The law merchant as to payment supra protest, does not extend to promissory notes, which are not, like bills of exchange, instruments calculated or intended for circulation all over the globe. Whoever, therefore, pays a note for another person without authority, express or implied, does so at his peril. (l)

In ordinary cases, however, he would become a transferee of the note.

(f) *Goodall v. Polhill*, 14 L. J. 146, C. P.; 1 C. B. Rep. 233, E. C. L. R. vol. 50, S. C.

(g) *Mertens v. Winnington*, 1 Esp. 113.

(h) *Ex parte Wackerbath*, 5 Ves. 574.

(i) *Ex parte Lambert*, 13 Ves. 179.

(k) *Vandewall v. Tyrrell*, M. & M. 87. Quære, whether it need be drawn out in full, or extended, as it is called.

(l) *Story on Promissory Notes*, s. 453.

*CHAPTER XXII.

[*212]

OF NOTICE OF DISHONOR.

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In general, it is incumbent on the holder of a bill or note dishonored, whether by non-acceptance, (a)(1) or by non-pay- [*213]

(a) *Blesard v. Hirst*, 5 Bur. 2672; *Goodall v. Dolley*, 1 T. R. 712. And the parties who are entitled to notice of non-acceptance, are discharged for want of it, and are not liable for subsequent non-payment, *Roscow v. Hardy*, 12 East, 434, unless the bill come into the hands of a subsequent indorsee for value who was not aware of the dishonor. *O'Keefe v. Dunn*, 6 Taunt. 305, E. C. L. R. vol. 1; 1 Marsh. 613, S. C.; *Dunn v. O'Keefe*, 5 M. & Sel. 282; *Whitehead v. Walker*, 9 Mee. & W.

(1) The drawer and indorsers are liable to an action by the holder immediately after the bill is refused acceptance, and before it is payable, on giving due notice of

ment, to give notice of that fact to the antecedent parties.(1) The requisites of notice and the consequences of neglect being much the same in both cases, under the general head of Notice of Dishonor, will be considered notice of non-acceptance and notice of non-payment.

In considering this subject, let us inquire,—first, what form of notice is required ; secondly, how notice is to be transmitted ; thirdly, at what place it is to be given ; fourthly, at what time ; fifthly, by whom it must be given ; sixthly, to whom ; seventhly, what are the consequences of neglect ; and, eighthly, how notice may be excused or waived ; and lastly, how it may be proved.

First, as to the form of the notice. Notice does not mean mere knowledge, but an actual notification. For a man who can be clearly

506,* S. C. See *Goodman v. Harvey*, 4 Ad. & El. 870, E. C. L. R. vol. 31 ; 6 N. & M. 272. Where a bill was reindorsed to a prior indorser, and in the interval had been dishonored by a refusal to accept, of which refusal the drawer had had no notice, it was held that the plaintiff declaring as immediate indorsee of the drawer, the defendant might plead those facts without averring that the plaintiff gave no value, or was not again indorsee before the bill became due, or had knowledge of the facts : *Bartlett v. Benson*, 15 L. J., 23 Exch. ; 14 M. & W. 733 ;* 3 D. & L. 274, S. C. ; and if notice of non-acceptance be given, the right to recover of the prior parties the full amount of the bill immediately, however distant its maturity, is complete. *Whitehead v. Walker*, 9 Mees. & W. 506.*

non-acceptance. *Wallace v. Agry*, 4 Mason, 336 ; *Watson v. Loring*, 3 Mass. 557 ; *Lenox v. Cook*, 8 Mass. 460 ; *Sterry v. Robinson*, 1 Day, 11 ; *Taan v. Le Gaux*, 1 Yeates, 204 ; *Weldon v. Buck*, 4 Johns. 144 ; *Winthrop v. Pepoon*, 1 Bay, 468 ; *Mason v. Franklin*, 3 Johnson, 202 ; *Corser v. Craig*, 1 Washington C. C. 424 ; *Miller v. Hackley*,*5 Johnson, 375 ; *Evans v. Gee*, 11 Peters, 80 ; *Evans v. Bridges*, 4 Porter, 348 ; *Wild v. Passamaquoddy Bank*, 3 Mason, 505.

It is not indispensable that a bill should be presented for acceptance until it becomes due ; but if presented and not accepted, notice of the non-acceptance must be given to the drawer. *Smith v. Roach*, 7 B. Monroe, 17.

The holder of a bill of exchange may commence a suit immediately upon the protest for non-acceptance. *Roosevelt v. Woodhull*, Anthon, 35.

Absence of the drawee from home, when called on for acceptance, is not a refusal to accept. *Bank of Washington v. Triplett*, 1 Peters, 35.

(1) Where the holder of an indorsed bill of exchange, which is not accepted by the drawee, merely informs the drawee that he has the bill but does not actually present it to him for acceptance, and the drawee thereupon tells him that the bill will not be accepted nor paid, the indorser is not thereby discharged, though no notice is given to him of the drawee's declarations. *Fall River Bank v. Willard*, 5 Metcalf, 216.

shown to have known beforehand that the bill would be dishonored is nevertheless entitled to notice.(b)

No particular form of notice is required. It may be either written or verbal.(c)(1) All that is necessary is, to apprise the party liable of the dishonor(d) of the bill in question, and to intimate that he is expected to pay it. And an announcement of the dishonor will (at least, if it come from the holder), amount to a sufficient intimation to the indorser, that he is held liable.(e) But where a mere demand of payment was *made, the Court observed, "There is no precise [*214] form of words necessary to be used in giving notice of the dishonor of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Here the letter in question did not convey to the defendant any such notice; it does not even say the bill was ever accepted. We, therefore, think the notice was insuffi-

(b) See *Burgh v. Leggee*, 5 M. & W. 418;* *Caunt v. Thompson*, 18 L. J. 127; 7 C. B. Rep. 400, E. C. L. R. vol. 62, S. C.

(c) See *Phillips v. Gould*, 8 C. & P. 355, E. C. L. R. vol. 34.

(d) *i. e.* (in the case of dishonor by non-payment), of presentment and non-payment. *East v. Smith*, 16 L. J. 292, Q. B.; 4 D. & Low. 744.

(e) It was held in *Furze v. Sharwood*, 11 L. J. 19, Q. B.; 2 Gale & D. 116; 2 Q. B. Rep. 416, E. C. L. R. vol. 42, S. C., that a notice of the dishonor of a bill of exchange sent *by the holder*, need not contain an announcement that the holder looks to the party to whom it is addressed for payment, but that if the notice do not come immediately from the holder, such an intimation may perhaps be necessary. See also *East v. Smith*, 16 L. J. 292, Q. B.; 4 D. & Low. 744. The formal protest itself, for which the notice is substituted, contains no such announcement. And see *Miers v. Brown*, 11 M. & W. 372,* where Mr. Baron Alderson says, "knowledge of dishonor obtained by communication from the holder of the bill amounts to notice;" and the observations of Cresswell, J., in *Caunt v. Thompson*, 18 L. J. 128, C. P.; 7 C. B. Rep. 400, E. C. L. R. vol. 62, S. C. In *King v. Bickley*, 2 Q. B. Rep. 419, E. C. L. R. vol. 42, it was held not necessary to state in a notice of dishonor, that the holder looks to the other party for payment, and that the mere sending of notice of dishonor is itself a sufficient intimation for that purpose. The following was the form of notice:—"Sir, I hereby give you notice that a bill for 50*l.* at three months after date, drawn by J. L. upon and accepted by J. E. of Blenheim Street, Chelsea, and indorsed by you, lies at No. 6 Ely Place, dishonored. Yours, &c., (signed) WM. KING."

(1) Notice of non-payment need not be in writing: a verbal notice is sufficient. *Cuyla v. Stevens*, 4 Wend. 566; *Glasgow v. Pratte*, 8 Missouri, 336.

Demand and refusal by the maker or acceptor, are both facts which in all cases must in some form or other be communicated to the indorser in the notice of protest. *Boehme v. Carr*, 3 Maryland, 202.

cient.”(f) Where the attorney for the indorsee wrote a letter to the indorser to the following effect: “A bill for 683*l.*, drawn by K. on J. & Co., and bearing your indorsement, has been put into our hands by A., with directions to take legal measures for the recovery thereof, unless immediately paid to us;” it was held, that this letter was not a sufficient notice of dishonor. “The notice of dishonor,” says Tindal, C. J., delivering the judgment of the Court of Exchequer Chamber, “which is commonly substituted in this country in the place of a formal protest (such formal protest being essential in other countries to enable the plaintiff to recover), most certainly does not require all the precision and formality which accompanied the regular protest, for which it has been substituted. But it should at least inform the party to whom it is addressed, either in express terms or by *necessary implication*,(g) that the bill has been dishonored, and that the holder looks to him for payment of the amount. Looking at this notice, we think no such intimation is conveyed in terms, or is necessarily to be inferred from its contents.” The Court further observed, that it was consistent *with the notice that the bill [215] had never been presented, but that the plaintiff intended to rely on an excuse for non-presentment, that the notice did not state that the bill was due, and might not have been intended as a notice of dishonor, but might have presupposed it.(h)(1)

(f) *Hartley v. Case*, 4 B. & C. 339, E. C. L. R. vol. 10 ; 6 Dowl. & R. 505.

(g) Perhaps “reasonable intendment” would be a more correct expression than “necessary implication:” at all events the expression “necessary implication” is not to be so construed as to exclude the possibility of any other inference. See the observations of Mr. Baron Parke on this expression in *Hedger v. Steavenson*, 2 M. & W. 799 ;* 5 Dow. 771, S. C. ; *Lewis v. Gompertz*, 6 M. & W. 402.*

(h) *Solarte v. Palmer*, 7 Bing. 530, E. C. L. R. vol. 20 ; 5 Moo. & P. 475 ; 1 C. & J. 417 ;* 1 Tyr. 371, S. C. ; affirmed in the House of Lords, 1834, 1 Bing. N. C. 194, E. C. L. R. vol. 27, where Park, J., declared the unanimous opinion of the Judges present, that the letter of the plaintiff’s attorney did not amount to notice of the dishonor of the bill, as such a notice ought, in express terms or by necessary implication, to convey full information that the bill had been dishonored. And Lord Brougham, C., on the ground that after *Hartley’s case*, the judgment of the Exchequer Chamber, and the 5th edition of Bayley on Bills, the case was too clear for appeal, said that the judgment of the Court below must be affirmed with costs. The propriety of dismissing the appeal, with costs, as a case too clear for argument, was the subject of considerable discussion among the Profession at the time. The decisions in *Hartley v. Case*, and *Solarte v. Palmer*, have been followed by no small inconvenience to the public, who are now hardly safe in giving notices of dishonor without professional aid.

(1) Notice of the dishonor of a bill need not state that the holder looks to the party notified for payment ; this is implied by the act of giving notice. *Cowles v.*

*The notice must not misdescribe the instrument so that the defendant may, perhaps, be led to confound it with [*216]

The following notices have accordingly been since held *insufficient*:

"The note for 200*l.*, drawn by H. H., dated 18th July last, payable three months after date and indorsed by you, became due yesterday, and is returned to me unpaid, I therefore request you will let me have the amount forthwith. 'These facts,' says Tindal, C. J., 'are compatible with an entire omission to present the note to the maker.'" Boulton v. Welsh, 3 Bing. N. C. 688, E. C. L. R. vol. 32; 4 Scott, 425, S. C.

"Sir, A bill for 30*l.*, dated the 18th August, 1837, at three months, drawn and indorsed by R. Everett upon, and accepted by W. Tuck, and indorsed by you, lies at my office due and unpaid. I am, &c., *S. J. Sydney*." Phillips v. Gould, 8 C. & P. 355, E. C. L. R. vol. 34.

"Messrs. Strange and Co., inform Mr. James Price that Mr. John Betterton's acceptance, 87*l.* 5*s.*, is not paid. As indorser, Mr. Price is called upon to pay the money, which will be expected immediately. Swindon, Dec. 1836." Strange v. Price, 10 Ad. & Ell. 125, E. C. L. R. vol. 37; 2 Per. & Dav. 278, S. C.

"Sir, This is to inform you that the bill I took of you, 11*l.* 2*s.* 6*d.*, is not took up, and 4*s.* 6*d.* expenses; and the money I must pay immediately. My son will be in London on Friday morning. *Wm. Messenger*." Messenger v. Southey, 1 Man. & Gr. 76, E. C. L. R. vol. 39; 1 Scott, N. R. 180, S. C.

The following notices of non-payment of six bills of exchange, were held insufficient:

1. "Sir, A bill for 29*l.* 17*s.* 3*d.*, drawn by Ward on Hunt, due yesterday, is unpaid, and I am sorry to say the person at whose house it was made payable don't speak very favorably of the acceptor's punctuality. I should like to see you upon it to-day."

2. "Mr. Maine: Sir, This is to give you notice that a bill drawn by you and accepted by Josias Bateman, for 47*l.* 16*s.* 9*d.*, due July 19, 1835, is unpaid and lies due at Mr. J. Furze's, 65 Fleet Street."

3. "Sir, Mr. Howard's acceptance for 21*l.* 4*s.* 4*d.*, due on Saturday, is unpaid; he has promised to pay it in a week or ten days. I shall be glad to see you upon it as early as possible."

4. "Sir, This is to give you notice that a bill for 176*l.* 15*s.* 6*d.* drawn by Samuel Maine, accepted G. Clisby, dated May 7th, 1835, at four months, lies due and unpaid at my house."

5. "P. Johnson, Esq.. Sir, This is to give you notice that a bill, 20*l.* 17*s.* 7*d.*, drawn by Samuel Maine, accepted by Richard Jones, dated May 21st, 1835, at four months, lies due and unpaid at my house."

Harts, 3 Conn. 517; Shrieve v. Duckham, 1 Litt. 194; Bank of Cape Fear v. Seawell, 2 Hawks. 560; Warren v. Gilman, 5 Shepl. 360. Nor need it state who the holder is. Bradley v. Davis, 26 Maine, 45.

Notice that a bill has been protested for non-payment is a sufficient notice of a demand and refusal. Spies v. Newberry, 2 Doug. 425; Smith v. Little, 10 N. Hamp. 526; Pinkham v. Macy, 9 Metc. 174. See Platt v. Drake, 1 Doug. 296; Nailor v. Bowie, 3 Maryland, 251; Farmer's Bank of Maryland v. Bowie, 4 Ibid. 290; Sasscer v. The Farmers' Bank, 4 Ibid. 409.

[*217] *some other. Thus, a notice in the following terms: "I give you notice, that a bill for, &c., at, &c., *drawn by you* upon, &c.,

6. "P. Johnson, Esq.: Sir, This is to give you notice that a bill for 148*l.* 10*s.* drawn by Samuel Maine, and accepted by G. Parker, dated May 22*d*, 1835, lies due, and unpaid at my house." *Furze v. Sharwood and others*, 11 L. J., Q. B. p. 19; 2 Q. B. Rep. 388, E. C. L. R. vol. 42, S. C.

But the following have been held to be *sufficient* notices of dishonor.

"Sir, A bill drawn by you upon, and accepted by Mr. Joshua Watson for 31*l.* 3*s.*, due yesterday, is dishonored and unpaid; and I am desired to give you notice thereof to request that the same may be immediately paid. I am, &c., *H. D. Rushburry*." *Woodthorpe v. Lawes*, 2 M. & W. 109.*

"Sir, the bill for £——, drawn by you, is this day returned *with charges*, to which your immediate attention is requested." (Signed by indorsee). *Grugeon v. Smith*, 6 Ad. & Ell. 499, E. C. L. R. vol. 33; 2 Nev. & P. 303, S. C.

"Sir, I am desired by Mr. Hedger to give you notice that a promissory note for 99*l.* 18*s.* payable to your order two months after the date thereof, became due yesterday, and has been returned unpaid, and I have to request you will please remit the amount thereof, *with 1*s.* 6*d.* noting*, free of postage, by return of post. I am, &c., *Jones Spyer*." *Hedger v. Steavenson*, 2 M. & W. 799;* 5 Dowl. 771, S. C.

"Your bill is unpaid, *noting 5*s.**" *Armstrong v. Christiani*, 5 C. B. Rep. 687, E. C. L. R. vol. 57.

"Your note has been returned dishonored," is sufficient, without the words, "your note has been presented for payment." *Edmonds v. Cates*, 2 Jurist, 183.

"Messrs. Houlditch are surprised that Mr. Cauty has not taken up Chaplin's bill, according to his promise: are also surprised to hear that Mrs. Gib's bill was returned to the holder unpaid."

This notice was followed by a visit from the indorser to the holder on the same day, in which he promised to write to the other parties, by whom, or by himself, the bill should be paid. *Houlditch v. Cauty*, 4 Bing. N. C. 411, E. C. L. R. vol. 33; 3 Scott, 209, S. C.

"Mr. Gompertz,—Sir, The bill of exchange for 250*l.*, drawn by S. Rendall, and accepted by Charles Stretton, and bearing your indorsement, has been presented for payment to the acceptor thereof, and returned dishonored, and now lies overdue and unpaid, with me, as above, of which I hereby give you notice. I am, &c. *C. Lewis*." *Lewis v. Gompertz*, 6 M. & W. 400.*

"I beg to inform you that Mr. D.'s acceptance for 200*l.*, drawn and indorsed by you, due 31*st* July, has been presented for payment and returned, and now remains unpaid." *Cooke v. French*, 10 Ad. & Ell. 131, E. C. L. R. vol. 37; 3 Per. & D. 596, S. C.

"Dear Sir: To my surprise, I have received an intimation from the Birmingham and Midland Counties Bank, that your draft on A. B. is dishonored, and I have requested them to proceed on the same." *Shelton v. Braithwaite*, 7 M. & W. 436.*

"Sir, I am instructed by Mr. Molineaux to give you notice that a bill (describing it) has been dishonored, &c." *Stocken v. Collin*, 9 C. & P. 653, E. C. L. R. vol. 38; 7 Mee. & W. 515,* S. C.

A party sent by the holder of a dishonored bill of exchange, called at the drawer's house the day after it became due, and there saw his wife, and told her that he had

lies at, &c., dishonored," is not sufficient to sustain an action against the indorser, who is not also the drawer.(i) But it has been held that if there be more than one bill to which the notice may apply, it lies on the defendant to prove that fact.(k) And if a note be improperly called a bill it is no objection,(l) nor if a bill be improperly called a note.(m) A misdescription which does not mislead is immaterial.(n)(1)

It has been held that notice of dishonor need not state on whose brought back the bill that had been dishonored. She said that she knew nothing about it, but would tell her husband of it when he came home. The party then went away not leaving any written notice: held sufficient notice of dishonor. *Housego v. Cowne*, M. & W. 348.*

"James Court's acceptance, due this day, is unpaid, and I request your immediate attention to it," was held sufficient. *Bailey v. Porter*, 14 M. & W. 44.* See the observations on this case in *Allen v. Edmunson*, 17 L. J. 293, Exch.; 2 Exch. 719,* S. C.

"Your draft upon C. for 50*l.*, due 3d March, is returned to us unpaid; and if not taken up this day, proceedings will be taken against you for the recovery thereof," was held sufficient. *Robson v. Curlew*, 2 Q. B. Rep. 421.

"A bill, &c. is unpaid, noting 5*s.*," is sufficient, the expression noting indicating a dishonor. *Armstrong v. Christiani*, 17 L. J. 181, C. P.; 5 C. B. Rep. 687, S. C.

Where the holder, when the bill became due, said to the executor of the acceptor, who was also an indorser, "I have brought a bill from the plaintiffs, you know what it is;" and the defendant said, "I am executor of the drawee, you must persuade the plaintiff to let the bill stand over a few days, because the acceptor has been dead only a few days. I shall see the bill paid." Notice of dishonor was held to be proved. *Caunt v. Thompson*, 18 L. J. 125, C. P.; 7 C. B. 400, S. C.

It is conceived that the following form of notice to be given by the holder to an indorser would be good. It may be easily altered and adapted to circumstances.

"No. 1, Fleet Street, London, 26th Sept. 1842:—Sir, I hereby give notice that the bill of exchange, dated 22d ult., drawn by A. B. of —, on C. D. of —, for 100*l.*, payable one month after date to A. B. or his order, and indorsed by you, has been duly presented for payment, but was dishonored, and is unpaid. I request you to pay me the amount thereof. I am, Sir, your obedient servant, G. H.—To Mr. E. F. of —, (Merchant)."

The construction of all written instruments is for the Court, but the meaning of peculiar expressions, which in particular places or trades have a known meaning, is for the jury. *Hutchison v. Bowker*, 5 M. & W. 542.*

(i) *Beauchamp v. Cash*, 1 D. & R., N. P. C. 3, E. C. L. R. vol. 16. Though every indorser is in the nature of a new drawer, ante, p. 113.

(k) *Shelton v. Braithwaite*, 7 M. & W. 436.*

(l) *Messenger v. Southey*, 1 Man. & Gr. 76, E. C. L. R. vol. 39; 1 Scott, N. R. 180, S. C.

(m) *Stockman v. Parr*, 11 M. & W. 809.*

(n) *Bromage v. Vaughan*, 9 Q. B. Rep. 608, E. C. L. R. vol. 58.

(1) If in a notice of non-payment, dated on the day the bill is due, it is stated by mistake that it was protested the evening before, and that the holders look to the indorser for payment, it is a question for the jury whether the indorser was misled.

behalf payment is applied for, nor where the bill is lying,^(o) and a misdescription of the place where the bill is *lying is immaterial,^(p) unless, perhaps, a tender were made there. [*218]

If the notice, by mistake, misdescribe the party giving it, by representing that it is given by or on behalf of A., when in reality it is given by or on behalf of B., it is, nevertheless, good. But the party who receives the notice is to be placed in the same situation as if the notice had really been given by A., and is at liberty to object any inability in A. to give notice; as, for example, that A. has been discharged by *laches*, or had no right of action on the bill.^(q)

It is not necessary that a copy of the protest should accompany notice of the dishonor of a foreign bill.^(r) But information of the protest should be sent,^(s) if the party to whom notice is transmitted reside abroad.^(t)

(o) *Woodthorpe v. Lawes*, 2 Mees. & W. 109; * *Housego v. Cowne*, 2 Mees. & W. 348; * *Harrison v. Ruscoe*, 15 L. J. 110, Exch.; 15 M. & W. 231, * S. C.

(p) *Rowlands v. Sprinnett*, 14 L. J. 227, Exch.; 14 M. & W. 7, * S. C.

(q) *Harrison v. Ruscoe*, 15 L. J. 110, Exch.; 15 M. & W. 231, * S. C.

(r) *Goodman v. Harvey*, 4 Ad. & El. 870, E. C. L. R. vol. 31; 6 N. & M. 372, S. C.

(s) *Rogers v. Stephens*, 2 T. R. 713; *Gale v. Walsh*, 5 T. R. 239; *Brough v. Parkins*, 2 Ld. Raym. 993; *Cromwell v. Hynson*, 2 Esp. 511; *Robins v. Gibson*, 3 Camp. 334; 1 M. & Sel. 288, S. C.; B. N. P. 271.

(t) See the Chapter on *Protest*.

Ontario Bank v. Petrie, 3 Wend. 456; *Ross v. Planters' Bank*, 5 Humphrey, 335; *Moorman v. Bank of Alabama*, 3 Porter, 353; *Rowan v. Odenheimer*, 5 Smedes & Marshall, 44; *Mills v. U. S. Bank*, 11 Wheat. 431; *Bank of Rochester v. Gould*, 9 Wendell, 279; *M'Knight v. Lewis*, 5 Barb. S. C. 681.

Any form of notice to an indorser is sufficient to fix his liability, if the instrument in question was intended to be described in such notice, and the party was not misled or deceived thereby as to the instrument intended. *Tobey v. Lennig*, 14 Penna. St. Rep. 483; *Kilgore v. Bulkley*, 14 Conn. 362; *Spann v. Baltzell*, 1 Branch, 301; *Crocker v. Getchell*, 10 Shepl. 392; *Cayuga County Bank v. Warden*, 1 Comstock, 413; *Dennistown v. Stewart*, 17 Howard, S. C. Rep. 606; *Young v. Lee*, 18 Ibid. 187.

Where there is no dispute as to the facts, the sufficiency of the notice is a question of law for the Court. *Remer v. Downer*, 21 Wend. 10; 23 Wend. 620; 25 Wend. 277; *Thompson v. The State*, 3 Hill, S. C. 77; *Fleming v. Fulton*, 6 Howard (Miss.), 473; *Johnston v. M'Grim*, 4 Devereux, 277; *Sinclair v. Lynch*, 1 Speers, 244; *Platt v. Drake*, 1 Dougl. 296; *Dole v. Gold*, 5 Barb. S. C. 490.

The notice of non-payment of a note to charge an indorser must show that the presentment was made at the proper time; therefore where the notice stated that the note had been "this day presented for payment," and payment refused, and the notice was without date, it was held, that it was defective. *Wynn v. Alden*, 4 Denio, 163.

Secondly. As to the mode of transmitting the notice.

Putting a letter into the post is the most common and the safest mode of giving notice. It is not necessary to prove that the letter was received, and any miscarriage will not prejudice the party giving notice.(u)(1) It has been ruled that, in London, delivery of a letter to a bellman in the street is not sufficient, and that it should be posted either at the General Post-office, or at an authorized receiving-house.(v)

It is not sufficient that the letter be directed, generally, to a person at a large town; as, for example, to "Mr. Haynes, Bristol,"(w) without specifying in what part of it he resides, unless where the person to whom the letter is sent is the drawer of the bill, and has dated it in an equally general *manner.(x) But if he has done so, then the sending of a letter, with an address as general as the drawer's description, will at least be evidence from which the jury may infer due notice.(y)(2) If the notice to the drawer

(u) *Saunderson v. Judge*, 2 H. Bla. 509; *Kuft v. Weston*, 3 Esp. 54; *Parker v. Gordon*, 7 East, 385; 3 Smith, 358, S. C.; *Langdon v. Hulls*, 5 Esp. 157; *Dobree v. Eastwood*, 3 C. & P. 250, E. C. L. R. vol. 14; *Stocken v. Collin*, 7 M. & W. 515; * 9 C. & P. 653, E. C. L. R. vol. 38, S. C.; *Woodcock v. Houldsworth*, 16 L. J. Exch. 49; 16 M. & W. 126,* S. C.

(v) *Hawkins v. Rutt*, Peake's N. P. C. 186; but see *Pack v. Alexander*, 3 M. & Sco. 789, E. C. L. R. vol. 30, and *Skilbeck v. Garbett*, 14 L. J. 339, Q. B.; 7 Q. B. 846, E. C. L. R. vol. 53, S. C. "A bellman," says Lord Denman, "is an ambulatory post-office."

(w) *Walter v. Haynes*, R. & M. 149.

(x) *Mann v. Moors*, 1 R. & M. 249; *Clarke v. Sharpe*, 3 M. & W. 166; * 1 Hor. & H. 35, S. C.; *Siggers v. Browne*, 1 Moo. & Rob. 520.

(y) *Ibid.*

(1) In order to charge an indorsee, where it is proper to send notice of protest by mail, which was not received in due course, the *onus* is upon the plaintiff to show that the notice was properly mailed. *Friend v. Wilkinson*, 9 Grattan, 31.

(2) Where the indorser of a promissory note resides in a town in which there are two post-offices, a notice of the dishonor of the note, addressed to him at the town generally, is sufficient *prima facie*; though liable to be rebutted by proof that he was accustomed to receive his letters at one of the offices only, and that the holder of the note might have ascertained that fact by reasonable inquiry. *Morton v. Westcott*, 8 Cushing, 425. Where an indorser resided in a village where was a post-office, at which he received letters, and had an office in a neighboring village, where he received most of his letters, it was held that notice of non-payment addressed to him at the latter village was sufficient. *Montgomery Bank v. Marsh*, 3 Selden, 481.

arrives too late, through misdirection, it is for the jury to say, whether the holder used due diligence to discover the drawer's address.(z) If the notice miscarry from the indistinctness of the drawer's handwriting on the bill, he will not be discharged.(a)

Where a witness said that the letter, containing notice of dishonor was put on a table to be carried to the post-office, and that by the course of business, all letters deposited on this table were carried to the post-office by a porter. Lord Ellenborough said, "You must go further; some evidence must be given that the letter was taken from the table in the counting-house and put into the post-office. Had you called the porter, and he had said that, although he had no recollection of the letter in question, he invariably carried to the post-office all the letters found upon the table, this might have done,(b) but I cannot hold this general evidence of the course of business, in the plaintiff's counting-house, to be sufficient."(c) The post-marks in town or country, proved to be such, are evidence that the letters, on which they are, were in the office to which those marks belong, at the time of the dates of such marks.(d) But they are not conclusive evidence.(e) A duplicate original, or an examined copy, or verbal evidence of a written notice of dishonor, are admissible without notice to produce the original.(f)

Notice of dishonor may be sent by the two-penny post.(g)

[*220] *This being a public office, the party sending notice is not answerable for its miscarriage.(h)

(z) Ibid. ; see *Esdaile v. Sowerby*, 11 East, 114.

(a) *Hewitt v. Thompson*, 1 Mood. & Rob. 543.

(b) So held in *Skilbeck v. Garbett*, 14 L. J. 338, Q. B. ; 7 Q. B. 846, E. C. L. R. vol. 53, S. C.

(c) *Hetherington v. Kemp*, 4 Camp. 194 ; *Hawkes v. Salter*, 4 Bing. 715, E. C. L. R. vol. 13 ; 1 Moo. & P. 750, S. P. ; and see *Hagedorn v. Reid*, 3 Camp. 379 ; 1 M. & Sel. 567, S. C.

(d) *Kent v. Lowen*, 1 Camp. 177 ; *Fletcher v. Braddyl*, 3 Stark. 64, E. C. L. R. vol. 3 ; *Rex v. Plumer, R. & R.*, C. C. 264 ; *Rex v. Watson*, 1 Camp. 215 ; *Langdon v. Hulls*, 5 Esp. 156 ; *Rex v. Johnson*, 7 East, 65.

(e) *Stocken v. Collin*, 7 M. & W. 515 ;* 9 C. & P. 653, E. C. L. R. vol. 38, S. C.

(f) *Ackland v. Pearce*, 2 Camp. 601 ; *Roberts v. Bradshaw*, 1 Stark. 28, E. C. L. R. vol. 2 ; *Kine v. Beaumont*, 3 B. & B. 288, E. C. L. R. vol. 7 ; 7 Moore, 112, S. C. ; *secus* as to a notice of the dishonor of a bill, not being the bill sued on ; *Lanauze v. Palmer*, 1 Moo. & Mal. 31.

(g) As to the time *when* it must be put in the two-penny post, see post, 222.

(h) *Dobree v. Eastwood*, 3 C. & P. 250, E. C. L. R. vol. 14.

Though there be a general post, the holder may send notice by a special messenger; but if the notice be not communicated by the special messenger till after the day when it would have been conveyed by the post, it is insufficient.⁽ⁱ⁾ Where the communication by the post is infrequent, as where the party to whom notice is to be sent lives out of the usual course of the post, so that a letter may, possibly, not reach him for a fortnight, he may be charged a reasonable sum by the holder for the expense of a special messenger.^(k)

Personal service of a written notice is not necessary.^(l)

In the case of a foreign bill, it is sufficient to send it by the first regular ship bound for the place to which it is to be sent; and it is no objection that, if sent by a chance ship, bound elsewhere, it would have arrived sooner. "It is sufficient for a party in India," says Eyre, C. J., "to send notice by the first regular ship going to England, and he is not bound to accept the uncertain conveyance of a foreign ship."—"It was enough to do so by the first ship, whether English or foreign, that was going to England in the regular course of conveyance."^(m)

We have already seen in what cases a copy or notice of the protest must accompany notice of the dishonor of a foreign bill.

Thirdly, as to the place at which notice is to be given.

A notice of dishonor should regularly be sent to the place of business, or to the residence of the party for whom it is designed.⁽¹⁾

(i) *Darbishire v. Parker*, 6 East, 3; 2 Smith, 195, S. C. It has been held, that it may arrive later during business hours in the same day without discharging the indorser. *Bancroft v. Hall*, Holt's N. P. C. 476.

(k) *Pearson v. Crallan*, 2 Smith, 404.

(l) *Housego v. Cowne*, 2 M. & W. 348.*

(m) *Muilman v. D'Eguino*, 2 H. Bla. 565.

(1) Notice put into the post-office if the parties live in different places is good. *Bussard v. Levering*, 6 Wheat. 102; *Munn v. Baldwin*, 6 Mass. 316; *Stanto v. Blossom*, 14 Mass. 116; *Crisson v. Williamson*, 1 A. K. Marshall, 456; *Foster v. McDonald*, 5 Alabama, 376; *Warren v. Gilman*, 5 Shepl. 360; *Lord v. Appleton*, 3 Shepl. 270; *Gindrat v. Mechanics' Bank*, 7 Alabama, 324; *Ellis v. Commercial Bank*, 7 Howard, Miss. 294; *Lindenberger v. Beall*, 6 Wheat. 104; *Fish v. Jackman*, 1 App. 467; *Weakly v. Bell*, 9 Watts. 273; *Jones v. Lewis*, 8 Watts & Serg. 14; *Hazleton Coal Co. v. Ryerson*, 1 Spencer, 129.

It is otherwise when the parties reside in the same town. *Green v. Darling*, 3 Shepl. 143; *Bailey v. Bank of Missouri*, 7 Missouri, 467; *Kramer v. McDowell*, 8 Watts & Serg. 138; *Ireland v. Kip*, 10 Johns. 490, S. C., 11 Johns. 231; *Stephenson v. Primrose*, 8 Porter, 155; *Curtis v. State Bank*, 6 Blackford, 312; *Davis v.*

If a party, whose name is on a bill, direct a notice to be sent to him when absent at a distance from his residence, so that its transmission thither, and thence to the prior parties, will occupy more time than if the notice had passed through the ordinary place of residence, a notice to him at the substituted and more distant place will, it seems, not only be a good *notice as against him, but also a good notice [*221] as against prior parties.⁽ⁿ⁾

A message sent to a counting-house, within the usual hours of business, has been held sufficient, though no person be in attendance. Thus, where the holder sent to a counting-house, and the messenger knocked at the outer door on two successive days, making noise sufficient to be heard by persons within, Lord Ellenborough said,^(o) "The counting-house is a place where all appointments respecting the business, and all notices, should be addressed; and it is the duty of the merchant to take care that a proper person be in attendance. It has, however, been argued, that notice in writing left at the counting-house, or put into the post, was necessary, but the law does not require it; and with whom was it to be left? Putting a letter into the post is only one mode of giving notice; but, where both parties are

⁽ⁿ⁾ *Shelton v. Braithwaite*, 8 Mees. & W. 252.*

^(o) But this case was decided before *Solarte v. Palmer*, and when the form of pleading made it unnecessary to distinguish between actual notice and a dispensation with notice.

Gowen, 1 App. 447; *Pierce v. Pendar*, 5 Metc. 352; *Brindley v. Barr*, 3 Harrington, 419; *Patrick v. Beazley*, 6 Howard (Miss.), 609; *Wilcox v. McNutt*, 2 Ibid. 776; *Timms v. Delisle*, 5 Blackford, 447; *Curtis v. State Bank*, 6 Ibid. 312; *Ransom v. Mack*, 2 Hill, 587; *Hogatt v. Bingaman*, 7 Howard (Miss.), 565.

Where a person has a dwelling-house and counting-room in the same town, a notice sent to either place is sufficient. *Bank of Columbia v. Lawrence*, 1 Peters, 578.

The post-mark on a letter is not evidence, *per se*, that the letter was deposited in the post-office on the day indicated by it; but, its genuineness being proved, it is *prima facie* evidence to fix the liability of a drawer of a protested bill, of the time when the notice was mailed. *Crawford v. Branch Bank*, 7 Alabama, 205.

The holder of a bill or note has a right to adopt a private conveyance instead of the mail, for the receipt and transmission of notice to a drawer or indorser of the dishonor thereof, but in such case it is incumbent on the holder to show that due diligence was used. *Jarvis v. St. Croix Man. Co.*, 10 Shepley, 287.

If a party receive notice of the dishonor of a bill in due time, he cannot object to the mode of conveyance. *Whiteford v. Burckmeyer*, 1 Gill, 127; *Bank of U. S. v. Corcoran*, 2 Peters, 121; *Hyslop v. Jones*, 3 McLean, 96; *Foster v. Sineath*, 2 Richardson, 338; *Bradley v. Davis*, 26 Maine, 45; *Manchester Bank v. Fellows*, 8 Foster, 302.

residing in the same town, sending a clerk is a more regular, and less exceptionable, mode.”(p) But the mere act of going and knocking at the door will not sustain an allegation of actual notice, though it may enlarge the time necessary for giving it, or under some circumstances be evidence of a dispensation.(q) A message left at the dwelling-house of a private person with his wife has been held sufficient.(r)(1)

(p) *Cross v. Smith*, 1 M. & Sel. 545; *Goldsmith v. Bland*, Chit. 9th ed. 454; *Bayley*, 6th ed. 276; *Bancroft v. Hall*, Holt's N. P. C. 476.

(q) *Allen v. Edmunson*, 2 Exch. Rep. 719.*

(r) *Housego v. Cowne*, 2 Mees. & W. 348.*

(1) Notice addressed to the post-office of the town where the indorser resides is sufficient. *Bank of Manchester v. Slason*, 13 Vermont, 334; *Carson v. State Bank*, 4 Alabama, 148; *Draper v. Clemens*, 4 Missouri, 52; *Glasscock v. Bank of Missouri*, 8 Ibid. 443; *Crawford v. Branch Bank at Mobile*, 7 Alabama, 305; *Dunlap v. Thompson*, 5 Yerger, 67; *Rand v. Reynolds*, 2 Grattan, 171; *Union Bank of Louisiana v. Stoker*, 1 Louis. Annual Rep. 269; *Seneca County Bank v. Neass*, 5 Denio, 329.

Where a notice is sent to the post-office from which an indorser will get a notice soonest, it is sufficient, though it is not the nearest office in point of distance. *Bank v. Lane*, 3 Hawks, 453; *Farmers' Bank v. Battle*, 4 Humphrey, 86; *Sherman v. Clark*, 3 McLean, 91; *Mercer v. Lancaster*, 5 Barr, 160; *Walker v. Bank*, 3 Kelly, 486; *Hunt v. Fish*, 4 Barb. S. C. 324.

Where the holder of a negotiable security knows the residence of the indorser, but does not know the post-office nearest thereto, notice of protest directed to the post-office, which after diligent inquiry is supposed to be nearest, will bind the indorser. *Marsh v. Barr*, 1 Meigs, 68.

It is not sufficient to look for the drawer at the place where the bill is drawn in order to give him notice; reasonable diligence should be used to ascertain his residence. *Fisher v. Evans*, 5 Binn. 542; *Blakely v. Grant*, 6 Mass. 386; *Branch Bank v. Pierce*, 3 Alabama, 321; *Barnwell v. Mitchell*, 3 Conn. 101; *Carroll v. Upton*, 3 Comstock, 272; *Hill v. Varrell*, 3 Greenl. 233; *Lowery v. Scott*, 24 Wend. 358; *Foard v. Johnson*, 2 Alabama, 565; see *Denny v. Palmer*, 5 Iredell, 610; *Page v. Prentice*, 5 B. Monroe, 7.

Where a notary, on the non-payment of a bill, left a notice for the indorser at his boarding-house, with his fellow-boarder, requesting him to deliver it to the indorser, who was not within at the time, the notice was held sufficient. *Bank of United States v. Hatch*, 6 Peters, 250; S. C., 1 McLean, 90; *Miles v. Hall*, 12 Smedes & Marshall, 332.

A notice of non-payment sent to the indorser inclosed under seal and delivered by the messenger to one in the employment of the indorsee, with directions not to open it, is insufficient. The sufficiency of a notice sent by a third person, depends on what the messenger did, not on what he was instructed to do by the holder of the note—on the message that was delivered, not on that which was sent. *Paine v. Esdell*, 19 Penna. Stat. Rep. 178.

Fourthly, as to the time *when* notice of dishonor should be given.

The general rule is, that notice must be given before action brought within a reasonable time, and after the dishonor; and that what is a reasonable time, is a question of law, depending on the facts of each particular case.^(s) Accordingly, the due interval, within which notice may or must be given in a variety of conjunctures, has been defined by the decision.

Where the holder, and the party to whom notice is addressed, live at different places, it is sufficient to send off notice on the day next after the day of dishonor. "It is," says Abbott, C. J., "of the greatest importance to commerce, that some plain and precise rule should be laid down, to guide persons *in all cases, as to the [*222] time within which notice of the dishonor of bills must be given. That time I have always understood to be, the departure of the post on the day following that in which the party receives intelligence of the dishonor. If, instead of that rule, we are to say, that the party must give notice by the next practicable post, we should raise, in many cases, difficult questions of fact, and should, according to the different local situations of parties, give them more or less facility in complying with the rule. But no dispute can arise from adopting the rule which I have stated."^(t)(1)

(s) *Darbishire v. Parker*, 6 East, 3; 2 Smith, 195, S. C.

(t) *Williams v. Smith*, 2 B. & Ald. 496.

(1) Notice of non-acceptance or non-payment must be given in a reasonable time, in order to charge the drawer or indorser. Though in some cases the question of what is reasonable notice has been left to the jury to decide, yet the vast current of American cases hold, with remarkable unanimity, that it is a matter of law for the determination of the Court exclusively. *Philips v. M'Curdy*, 1 Har. & Johns. 187; *United States v. Barker*, Paine, 156; 12 Wheat. 559; *Stanto v. Blossom*, 14 Mass. 116; *Mallory v. Kirwan*, 2 Dall. 192; *Warder v. Carson's Ex.*, Ibid. 233; *Steinmetz v. Curry*, 1 Dall. 235; *Bank of North America v. M'Knight*, 1 Yeates, 147; *Denniston v. Imbrie*, 3 Wash. C. C. 396; *London v. Howard*, 2 Hayw. 332; *Scarborough v. Harris*, 1 Bay, 177; *Bryden v. Bryden*, 11 Johns. 187; *Ribble v. Jefferson*, 5 Halsted, 139; *Stott v. Alexander*, 1 Wash. 331; *Dodge v. Bank of Kentucky*, 2 A. K. Marsh. 616; *Mohawk Bank v. Broderick*, 10 Wendell, 304; 13 Ibid. 133; *Hagar v. Boswell*, 4 J. J. Marshall, 61; *Bank of Utica v. Bender*, 21 Wendell, 643; *Warren v. Gilman*, 3 Shepl. 70; *Brown v. Ferguson*, 4 Leigh, 37; *Routh v. Robertson*, 11 Smedes & Marshall, 382.

The holder is bound to give notice of the dishonor of a bill to the parties to be charged, by the next practicable mail. *Mitchell v. De Grand*, 1 Mason, 176; *Talbot v. Clark*, 8 Pick. 54; *Robinson v. Arnes*, 20 Johns. 146; *Dodge v. Bank of Kentucky*, 2 A. K. Marshall, 616; *Sewall v. Russell*, 3 Wend. 277; *Hickman v. Ryan*, 5 Litt.

If the post does not go out on the next day, notice need not be posted till the day after, or till the next post day. Thus, where the plaintiff received intelligence of the dishonor on Thursday morning at nine o'clock, though the post did not go until nine o'clock at night, and no bag was made up on the Friday, but the plaintiff wrote on Saturday, Lord Tenterden said, "It suffices, in this case, that the plaintiff put the letter into the post on Saturday, for, if he had done so on the Friday, it would not have been forwarded till the Saturday night, and it is immaterial whether the letter lay in the post-office or in the plaintiff's hands till the Saturday."(*u*) So, if the post goes out at an unreasonable hour in the morning, the holder is not bound to get up and write by the second post, but may wait for the third. Thus, where a bill was dishonored on Saturday, in a place where the post went out at half-after nine in the morning, it was held, that it was sufficient notice of dishonor to send a letter by the following Tuesday morning's post.(*v*)

Where both the parties live in the same town, or where they live in London,(*w*) notice must be given in time to be received in the course of the day following the day of dishonor.(*x*) And, therefore, though

(*u*) *Geill v. Jeremy*, Moo. & M. 61.

(*v*) *Hawkes v. Salter*, 4 Bing. 715, E. C. L. R. vol. 13; 1 Moo. & P. 750; *Bray v. Hadwen*, 5 M. & Sel. 68; *Wright v. Shawcross*, 2 B. & Ald. 501, *u*.

(*w*) I am not aware that the precise extent of the word London, as here used, has been defined by any decision, nor that it has been held incumbent on a person giving notice of dishonor, to treat all persons living within the limits of what was formerly the twopenny post, as living in the same place.

(*x*) *Scott v. Lifford*, 9 East, 347; 1 Camp. 246, S. C.; *Smith v. Mullett*, 2 Camp. 208; *Marsh v. Maxwell*, 2 Camp. 210, *n*.; *Jameston v. Swinton*, 2 Camp. 374; 2 Taunt. 224, S. C.; *Hilton v. Fairclough*, 2 Camp. 633; *Haynes v. Birks*, 3 Bos. & Pul. 599; *Williams v. Smith*, 2 B. & Ald. 500; *Fowler v. Hendon*, 4 Tyr. 1002.

24; *Mead v. Engs*, 5 Cowen, 303; *Freeman's Bank v. Perkins*, 6 Shepl. 292; *Beckwith v. Smith*, 9 Ibid. 125; *Jones v. Wardell*, 6 Watts & Serg. 399; *Denny v. Palmer*, 5 Iredell, 610; *Whittlesey v. Dean*, 2 Aiken, 263; *Curry v. Bank of Mobile*, 8 Porter, 360; *Goodman v. Norton*, 5 Shepl. 381; *Chick v. Pillsbury*, 11 Ibid. 458; *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Downs v. The Planters Bank*, 1 Smedes & Marshall, 261; *Deminds v. Kirkham*, Ibid. 644; *Hoopes v. Newman*, 2 Ibid. 71; *Carter v. Burley*, 9 N. Hamp. 558; *Manchester Bank v. Fellows*, 8 Foster, 302.

Where a bill drawn in this country on Europe has been dishonored, notice must be sent by the first ship bound to any port of the United States; and it is not sufficient to send it by the first ship for the port where the drawer and indorser reside. *Fleming v. M'Clure*, 1 Brevard, 428.

a letter be put into the twopenny post on the day after the dishonor, [*223] it will not be *sufficient notice, unless posted in time to be delivered the same day. Lord Ellenborough: "Where the parties reside in London, each party should have a day to give notice. The holder of a bill is not, *omissis omnibus aliis negotiis*, to devote himself to giving notice of its dishonor. If you limit a man to a fractional part of a day, it will come to a question how swiftly the notice can be conveyed,—a man and horse must be employed, and you will have a race against time. But here a day has been lost. The plaintiff had notice himself on the Monday, put in the letter on Tuesday afternoon, and the defendant does not receive notice till the Wednesday. If a party has an entire day, he must send off his letter conveying the notice within post-time of that day. The plaintiff only wrote the letter to the defendant on the Tuesday. It might as well have continued in his writing-desk on the Tuesday night, as lie at the post-office." (y) A person who puts the letter into the post on the day when it ought to be received, must show affirmatively that it was posted in time to be received on that day. (z) The post-mark is not conclusive evidence of the time when a letter is posted. (a)

A party receiving notice of dishonor need not transmit it till the next post after the day on which he himself receives the notice; (b) although there should be no post on the next day.

It has been doubted (c) whether, seeing that the acceptor of an inland bill has, as in the case of other debts, the whole of the day on which the bill falls due to pay it, notice of non-payment *can* be given till the day after. But it is now settled that notice may be given, at any time after demand, on the day the bill becomes due. "The other party," observes Lord Ellenborough, "cannot complain of the extraordinary diligence used to give him information." (d) (1)

(y) *Smith v. Mullett*, 2 Camp. 208.

(z) *Fowler v. Hendon*, 4 Tyr. 1002.

(a) *Stocken v. Collin*, 7 M. & W. 515; * 9 C. & P. 653, E. C. L. R. vol. 38, S. C.

(b) *Geill v. Jeremy*, Moo. & M. 61.

(c) *Leftley v. Mills*, 4 T. R. 170.

(d) *Burbridge v. Manners*, 3 Camp. 193; *Ex parte Moline*, 19 Ves. 216; *Hume v. Peploe*, 8 East, 169; *Hine v. Allely*, 4 B. & Ad. 624, E. C. L. R. vol. 24; 1 N. & M. 433, S. C.

(1) *Coleman v. Carpenter*, 9 Barr, 178. The holder of a bill, in order to charge an indorser residing in another place, may send notice of its dishonor by the mail,

Notice of dishonor may be given on the same day, though there be no actual refusal, if the house where the bill is payable be shut up and no one be there.(e)(2)

A banker with whom a bill is deposited to receive payment *is, for the purpose of notice, to be considered as a distinct [*224] holder, and has a day to give notice to his customer, and the customer another day to give notice to the antecedent parties.(f) Upon the same principle, where the holder of a bill employed an attorney to give notice to an indorser, and the attorney wrote to another professional man, requesting him to ascertain the indorser's residence, and received an answer to his letter, conveying the desired information, on the 16th of the month, which information he communicated to his principal on the 17th, and on the 18th, forwarded the letter containing the notice of dishonor, it was held sufficient. "If," says Lord Tenterden, "the notice had been sent to the principal, he would have been bound to give notice on the next day, but it having been sent to the agent, he was not bound to give notice on the following day. A banker who holds a bill for a customer is not bound to give notice of dishonor on the day on which the bill is dishonored. He has another day, and, upon the same principle, I think the attorney in this case was entitled, by law, to be allowed a day to consult his client."(g)

Where a bill passes through several branch banks of the same establishment, each branch may be considered as a distinct holder entitled to receive and transmit notice as such.(h)

(e) *Hine v. Allely*, 4 B. & Ad. 624, E. C. L. R. vol. 24; 1 N. & M. 433, S. C.

(f) *Robson v. Bennett*, 2 Taunt. 388; *Langdale v. Trimmer*, 15 East, 291; *Bray v. Hadwen*, 5 M. & Sel. 68.

(g) *Firth v. Thrush*, 8 B. & C. 387, E. C. L. R. vol. 15; 2 Man. & Ry. 259; *Dans. & L.* 151, S. C.

(h) *Corlett v. Jones*, Ex. 1842; *Clode v. Bayley*, 12 M. & W. 51.* And so held, although the bill may have passed by delivery without indorsement. *Ibid.*

if he chooses to send by mail of the day of the default; but if he does not, he must deposit the notice, directed to the indorser, in the post-office in time to be sent by the mail of the next day, unless the mail of that day be made up and closed at an unreasonably early hour, or in other words, before early business hours; or if there be no mail of that day, or the mail of that day be closed at an unreasonably early hour, then by the next practicable mail. *Lawson v. Farmers' Bank of Salem*, 1 Ohio State Rep. 206; *Manchester Bank v. Fellows*, 8 Foster, 302.

(1) Although a demand cannot be made, yet notice must be given within the same time, as if the demand had been made. *Price v. Young*, 1 McCord, 339.

Sunday, Christmas Day, Good Friday, a public thanksgiving or fast day, or any festival on which a man is forbidden by his religion to transact any secular affairs (for the law merchant respects the religion of different people), is not to be reckoned, in computing the time within which notice of dishonor should be given.⁽ⁱ⁾(1) If a man receive a letter containing notice of dishonor on such a day, he is not bound to open it, and will be considered as having received notice on the next day.

It lies on the plaintiff to show that notice was given in due time and before action brought. In an action by the indorsee against an indorser of a bill of exchange, a witness stated that, either two or three days after the dishonor of the bill, notice was given by letter to the defendant; notice in two days being in time, but notice on the [*225] third too late. Lord Ellenborough,—“The witness says two or three days, but the third day would be too late. It lies upon you to show that notice was given in due time, and I cannot go upon probable evidence without positive proof of the fact. Nor can I infer due notice from the non-production of the letter; the only consequence is, that you may give parol evidence of it. The *onus probandi* lies upon the plaintiff, and, since he has not proved due notice, he must be nonsuited.”^(k) So it lies on the plaintiff to show that notice was given and received before action brought. Therefore, where the notice was given and the action brought on the same day, the plaintiff was nonsuited, because he did not show by affirmative evidence, that the notice was received before the writ issued.^(l)

When the party to whom notice should be given cannot be found, the time is extended.^(m)

Fifthly, we are to consider by whom the notice ought to be given.

The object of notice is twofold: first, to apprise the party to whom

(i) 39 & 40 Geo. 3, c. 42; 7 & 8 Geo. 4 c. 15; *Lindo v. Unsworth*, 2 Camp. 602; *Tassel v. Lewis*, 1 Ld. Raym. 743.

(k) *Lawson v. Sherwood*, Stark. 314.

(l) *Castrique v. Bernabo*, 14 L. J. 3, Q. B.; 6 Q. B. Rep. 498, E. C. L. R. vol. 51, S. C.

(m) See post, p. 234.

(1) *Martin v. Ingersoll*, 8 Pick. 1. Bills of exchange payable in Massachusetts are properly protested on the day preceding the fast day, if they fall due on that day. *Chamberlain v. Maitland*, 5 B. Monroe, 448.

it is addressed of the dishonor; and, secondly, to inform him that the holder, or party giving the notice, looks to him for payment.⁽ⁿ⁾ Hence it follows that notice can only be given by some party to the instrument, though he need not be the *actual holder* of the bill at the time,^(o) but that a stranger is competent to give it.^(p)(1) And it has been held by Lord Eldon, that notice by the first indorser, who had not himself received notice from the second indorser, and who was not, therefore, obliged to take back the bill, was insufficient as between the second indorser and the drawer.^(q) And it seems clear, that even a party of the bill, who has been already discharged by laches, or who could not in any event sue, is incompetent to give notice.^(r) But a prior indorser who has himself received due notice may transmit it.^(s) And notice by the holder, or by a party who is liable to be sued and *may be entitled to sue, will enure to the benefit [*226] of all antecedent or subsequent parties. So that a notice by the last indorsee to the drawer, will operate as a notice from each indorser to the drawer; and if the payee or first indorser has duly received notice, or has not been discharged by laches, a notice by him to the drawer will be equivalent to a notice from each indorser, and from the holder to the drawer.^(t) And a notice from an inter-

(n) Tindall v. Brown, 1 T. R. 167.

(o) Chapman v. Keane, 3 Ad. & E. 193, E. C. L. R. vol. 30; 4 N. & M. 607, S. C.; Harrison v. Ruscoe, 15 L. J. 110, Ex.; 15 M. & W. 231,* S. C.; Lysaght v. Bryant, 19 L. J. 160, C. P.

(p) Stewart v. Kennett, 2 Camp. 177.

(q) Ex parte Barclay, 7 Ves. 597; but quære since the case of Chapman v. Keane, 3 Ad. & E. 193, E. C. L. R. vol. 30; 4 N. & M. 607, S. C.; unless the party giving the notice had been already discharged by laches.

(r) Harrison v. Ruscoe, 15 L. J. 110, Exch.; 15 M. & W. 231,* S. C.; see post, p. 226; and see Miers v. Brown, 11 M. & W. 372.*

(s) Jameson v. Swinton, 2 Camp. 373; 2 Taunt. 224, S. C.; Wilson v. Swabey, 1 Stark. 34, E. C. L. R. vol. 2.

(t) Bayley, 6th ed. 251.

(1) Notice must be given by, or by the authority of a party, or one who on the return of the bill to him would have a right of action on it. Chanvine v. Fowler, Wendell, 179; Bachellor v. Priest, 12 Pick. 406.

A written notice not signed by any person of the dishonor of a bill, and sent by mail to an indorser is insufficient to hold him. Walker v. State Bank, 8 Missouri, 704.

He who accepts or pays *supra protest*, must give the same notice in order to charge a party which is necessary to be given by other holders. Martin v. Ingersoll, 8 Pick. 1; Grosvenor v. Stone, Ibid. 79; Konig v. Bayard, 1 Peters, 262.

There is the same necessity for notice of non-acceptance, &c., when a bill is paid, for the honor of one of the parties, as in other cases. Lenox v. Leverett, 10 Mass. 1.

mediate party may, in pleading, be described as a notice from the plaintiff.(u)

There are two *Nisi Prius* cases(v) to be found in the books, in which Lord Kenyon and Lord Ellenborough are reported to have held respectively, that notice of dishonor from the acceptor himself was equivalent to notice by the holder. But it is conceived, that in those cases the holder must have constituted the acceptor his agent for the purpose of giving notice, or that they are not law, being at variance with the general principle laid down in *Tindal v. Brown*, and recognized in a variety of subsequent cases.(w)

Notice of dishonor may be given by an agent who holds the bill as a banker or attorney, and in the agent's own name.(x) And it has been held, that a notice given by a party to a bill in the name of an indorser, but without his authority, is good.(y)

But a tradesman's foreman or servant is not necessarily such an agent as can give a good notice.(z)(1)

(u) *Newman v. Gill*, 8 C. & P. 367, E. C. L. R. vol. 34.

(v) *Shaw v. Croft*, Chit. 9th ed. 494; Selw. 9th ed. 332; *Rosher v. Kieran*, 4 Camp. 87.

(w) See *Baker v. Birch*, 3 Camp. 107; *Pickin v. Graham*, 1 C. & M. 725; * 3 Tyr. 923, S. C.; *Harrison v. Ruscoe*, 15 L. J. 110, Exch.; 15 M. & W. 231,* S. C. The case of *Tindal v. Brown*, however, so far as it authorizes the conclusion that the party giving notice must be *actual holder*, is now overruled. *Chapman v. Keane*, 3 Ad. & El. 193, E. C. L. R. vol. 30; 4 N. & M. 607, S. C.

(x) *Woodthorpe v. Lawes*, 2 M. & W. 109.* As to the effect of a misdescription of his principal by the agent, see *ante*, as to the form of notice.

(y) *Rogerson v. Hare*, 1 Jur. 1.

(z) *East v. Smith*, 16 L. J. Q. B. 292; 4 D. & Low. 744, S. C.

(1) A bank, having a bill for the purpose of collection only, is considered the real holder for the purpose of making demand and giving notice. *Freeman's Bank v. Perkins*, 7 Shepley, 292; *Warren v. Gilman*, 5 Ibid. 360; *Ogden v. Dobbin*, 2 Hall, 112; *Manchester Bank v. Fellows*, 8 Foster, 302.

The notary who protests a foreign bill, is authorized to give notice of its dishonor to all persons who are responsible to the holders, and a notice describing himself officially to which his name is printed, is good. *Crawford v. Branch Bank*, 7 Alabama, 205; *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Cowperthwaite v. Sheffield*, 1 Sandf. Sup. Ct. Rep. 416; *Shed v. Brett*, 1 Pick. 401; *Burbank v. Beach*, 15 Barb. 326.

It is not necessary that notice should be given by the holder; if given by any person authorized by the holder it is sufficient. See *Haslett v. Poultney*, 1 Nott & McCord, 466; *Stanto v. Blossom*, 14 Mass. 116; *Tunno v. Lague*, 2 Johns. Cas. 1; *Chanvine v. Fowler*, 3 Wendell, 179; *Bank of Cape Fear v. Seawell*, 2 Hawks, 560; *Mead v. Engs*, 5 Cowen, 303; *Van Hoesen v. Van Alstyne*, 3 Wendell, 75; Cow-

Sixthly, to whom notice is to be given. It is the safest course for the holder to give notice himself to all the parties against whom he may wish to proceed; for if he merely give notice to his immediate indorser, and it be not regularly transmitted to the antecedent parties, they are discharged; and, even if it be so transmitted, the evidence required to trace the notice back to a remote party is more voluminous, and may be difficult to procure. But if, where there are several indorsements, *notice of the dishonor be given by the holder to his immediate indorser, and to him only, but an unbroken [*227] chain of notices hang regularly, from indorsee to indorser, back to a distant indorser or to the drawer, the latter is liable either to his indorsee or to the holder. Thus, where all the parties lived in London, and the holder on the day of dishonor gave notice to the fifth indorser, and the fifth on the following day to the fourth, he on the day after to the third, the third on the next day to the second, and the second on the following day to the first, it was held in an action by the second against the first indorser, that due notice had been given.(a) And it would also have been sufficient in an action by the holder, at the time of dishonor, against the fifth indorser, and in an action by the fifth indorser against the first.(b) But, if there be any *laches* in the circulation of the notice back through the several parties, even though the neglect of one be compensated by the extraordinary diligence of another, *laches* once committed discharges all the antecedent parties, and subsequent notices are invalid, for they are given by parties who are no longer liable on the bill.(c) "It is not enough that the drawer or indorser receive notice in as many days as there are subsequent indorsers, unless it is shown that each indorser gave notice within a day after receiving it; as, if any one has been beyond the day, the drawer and prior indorsers are discharged."(d)(1) Nor can a party, in such a case, by waiving his

(a) *Hilton v. Shepherd*, 6 East, 14, n.

(b) *Smith v. Mullett*, 2 Camp. 208; *Marsh v. Maxwell*, 2 Camp. 210; *Jameson v. Swinton*, 2 Camp. 373; 2 Taunt. 224, S. C.; *Wilson v. Swabey*, 1 Stark. 34.

(c) *Harrison v. Ruscoe*, 15 L. J. 10, Exch.; 15 M. & W. 231,* S. C.

(d) Per Lord Ellenborough, in *Marsh v. Maxwell*, 2 Camp. 210, n.; *Smith v. Mullett*, 2 Camp. 208.

perthwaite v. Sheffield, 6 Sandf. S. C. Rep. 416; *Harris v. Robinson*, 4 Howard, U. S. Rep. 326; *Glasgow v. Pratte*, 8 Missouri, 336; *Glasscock v. Bank*, Ibid. 443.

(1) Where there are several successive indorsers of a bill of exchange or promissory note, whether the indorsements be upon actual negotiation for value or for the purpose of collection only, the holder may send notice of its dishonor to his imme-

own discharge, waive the discharge of antecedent parties. Defendant was the eighth, plaintiff the eleventh, indorser of a bill. The instrument then passed through several subsequent hands, was dishonored at maturity, and returned to the immediate indorsee of the plaintiff. It remained in his hands three days, and then the plaintiff paid it and gave notice to the defendant, who received the notice in a shorter interval from the day of dishonor than would have elapsed had each party through whose hands the bill was returned, taken the full time allowed by law for giving notice. Abbott, C. J.: "In this case the plaintiff was clearly discharged by the *laches* of

immediate indorser; and if that indorser, after receiving such notice, give seasonable notice to his immediate indorser, the latter is liable to his immediate indorser though he does not receive notice as soon as if it were transmitted to him by the holder immediately upon the dishonor: and so of each successive indorser. *Eagle Bank v. Hathaway*, 5 Metcalf, 212; *Butler v. Duval*, 4 Yerger, 265; *Farmer v. Rand*, 4 Shepl. 453.

Each party has a full day to give notice, but the over-diligence of one shall not be made to supply the under-diligence of another. *Brown v. Ferguson*, 4 Leigh, 37; *Simpson v. Tierney*, 5 Humphrey, 419; *American Life Ins. & Trust Co. v. Emerson*, 4 Smedes & Marshall, 177; *Safford v. Wyckoff*, 1 Hill, 11; *Whitman v. Farmers' Bank*, 8 Porter, 258; *Etting v. Schuylkill Bank*, 2 Barr, 355; *Smith v. Roach*, 7 B. Monroe, 17; *Carmena v. Bank of Louisiana*, 1 Louis. Annual Rep. 369; *Crocker v. Getchell*, 10 Shepl. 392; *Manchester Bank v. Fellows*, 8 Foster, 302.

Notice of the protest of a bill may be transmitted, through the several indorsers, to the drawer; and though the route may be circuitous, and delay be occasioned, yet such notice, sent with due diligence throughout, will render the drawer and all the indorsers liable. *Triplett v. Hunt*, 3 Dana, 128.

A notice given by the holder to the several indorsers, enures to the benefit of the indorsers or preceding parties, so that the first indorser who has received notice of its non-payment from the holder, but not from the second indorser, is liable to the second indorser, in the same manner as though notice had been received from him. *Marr v. Johnson*, 9 Yerger, 1.

An agent of the holder is allowed one day to give notice to his principal of a default, and the principal is entitled to one day after he receives notice to give or forward notice by mail to the drawer or indorser. *Ellis v. The Commercial Bank*, 7 Howard, Miss. 294; *Crawford v. Branch Bank*, 7 Alabama, 205; *Ohio Life Ins. & Trust Co. v. McCague*, 18 Ohio, 54; *Hill v. Planters' Bank*, 3 Humph. 670; *McNeil v. Wyatt*, Ibid. 125; *Foster v. McDonald*, 3 Alabama, 34; *Carmena v. Bank of Louisiana*, 1 Louis. Annual Rep. 369; *Colt v. Noble*, 5 Mass. 167; *Church v. Barlow*, 9 Pickering, 547; see *Johnson v. Harth*, 1 Bailey, 482; *U. S. Bank v. Goddard*, 5 Mason, 366; *Fish v. Jackman*, 1 App. 467; *Lawson v. Farmers' Bank*, 1 Ohio State Rep. 206.

Neglect to give notice to the first indorser, does not discharge a subsequent indorser, who had notice. *Matthews v. Fogg*, 1 Richardson, 369; *Wilcox v. Mitchell*, 4 Howard (Miss.), 272.

the holder. Then can he, by paying the bill, place the prior indorsers in a worse situation than that in which they would otherwise have been? I think he cannot do so, and that in paying this bill he has paid it in his own wrong, *and cannot be allowed to recover [*228] upon it against the defendant.”(e)

As notice may be given by leaving it at the counting-house, notice to an agent for the general conduct of business must of consequence be sufficient notice to the principal:(f) but notice to a man’s attorney is not sufficient.(g) A verbal message left at the drawer’s house with his wife has been held sufficient. “A person, not a merchant,” says Bolland, B., “who draws a bill of exchange, undertakes to have some one at his house to answer any application that may be made respecting it when it becomes due.”(h)

If the drawer of a bill become bankrupt, notice must nevertheless be given to him, at all events, before the choice of assignees. If the assignees are appointed, perhaps notice should be given to them.(i) If the bankrupt have absconded, there being as yet no assignees, and a messenger be in possession, notice should be given to the messenger, and to the petitioning creditor.(k)

If the party be dead, notice should be given to his personal representatives.(l)(1)

(e) *Turner v. Leach*, 4 B. & Ald. 451, E. C. L. R. vol. 6.

(f) *Crosse v. Smith*, 1 M. & Sel. 545.

(g) *Ibid.*

(h) *Housego v. Cowne*, 2 M. & W. 348.*

(i) *Ex parte Moline*, 19 Ves. 216; *Rhode v. Proctor*, 4 B. & C. 517, E. C. L. R. vol. 10; 6 D. & Ry. 610; *S. C. Ex parte Johnson*, 3 Deac. & Chitty, 433; 1 Mont. & Ayr. 622; *Ex parte Chapped*, 3 M. & Ayr. 490; 3 Dea. 298, S. C.

(k) So in Scotland notice must be given to the party who represents the estate. (*Thomp.* 535.)

(l) I am aware of no actual decision to this effect. But it has been so decided in America, and that if there be no personal representatives, a notice sent to the residence of the deceased party’s family is sufficient. *Merchants’ Bank v. Birch*, 17 Johns. Rep. 25, Bayley, American ed. 418.

(1) The administrator of an indorser appointed before the maturity of the note, who has given due notice of his appointment, is entitled to notice. *Oriental Bank v. Blake*, 22 Pick. 206.

See as to notice where the indorser is dead, *Planters’ Bank v. White*, 2 Humphrey, 112; *Cayuga Bank v. Bennett*, 5 Hill, 236; *Barnes v. Reynolds*, 4 Howard (Miss.) 114.

A notice addressed through mail in due time to the “legal representative” of A.

Where a bill is accepted payable at a particular place, it is not necessary, even in action against the acceptor, to have given him notice of the dishonor. "Bills of exchange," says Abbott, C. J., "of late years have been made payable by the acceptor, either at the houses of his friends or agents, they being expressly named in the acceptance, or at banking houses, or at houses merely described by their number in a certain street. It is most convenient that the same rule should be laid down as applicable in all these cases. The most plain and simple rule to lay down is this; that the effect of an [*229] *acceptance in any of these forms, is a substitution of the house, banker, or other person therein mentioned, for the house or residence of the acceptor, and, consequently, that the presentment at the house, or to the party named in the acceptance, is equivalent to presentment at the house of the acceptor. This rule will, I think, be equally applicable to the case of every acceptance, and will be convenient and advantageous to the public."(*m*) *A fortiori*, it is unnecessary to have given the acceptor such a notice in any action against the drawer.(*n*)

Where the parties are jointly liable on the bill, notice to one is sufficient.(*o*)(1)

If a man, not a party to a bill, assign without indorsement, he is not entitled to notice of dishonor.(*p*)(2)

(*m*) Treacher v. Hinton, 4 B. & Ald. 413, E. C. L. R. vol. 6; Smith v. Thatcher, 4 B. & Ald. 200, E. C. L. R. vol. 6; Pearse v. Pemberthy, 3 Camp. 261.

(*n*) Edwards v. Dick, 4 B. & Ald. 212, E. C. L. R. vol. 6.

(*o*) Porthouse v. Parker, 1 Camp. 83; Bignold v. Waterhouse, 1 M. & Sel. 259. But it is conceived, that notice to a private member of a joint stock banking company would not suffice. See Powles v. Page, 3 C. B. 16, E. C. L. R. vol. 54.

(*p*) Van Wart v. Woolley, 3 B. & C. 439, E. C. L. R. vol. 10; 5 D. & R. 374;

deceased, the indorser, to the last residence of the deceased, is sufficient, though it does not appear that the administrator or executor ever received it. Pillow v. Hardeman, 3 Humphrey, 538.

(1) Joint owners of a note, who jointly indorse the same, do not thereby constitute themselves partners quoad hoc, so that notice of the dishonor of a bill to one will charge both. Both must have notice. Sayer v. Frick, 7 Watts & Serg. 383; Willis v. Green, 5 Hill, 232.

Where a partnership indorses a note, notice of its dishonor, given to a surviving partner is sufficient to hold the legal representatives of the deceased partner, although the holder knew of the decease of such partner before the maturity of the note. Dabney v. Stidger, 4 Smedes & Marshall, 749; Cocke v. Bank, 6 Humph. 51.

(2) A party who purchases a bill and transmits it on account of goods ordered

And, as a general rule, a man transferring by delivery without indorsement, a bill or note payable *to bearer*, is not entitled to notice.

We have already seen, *(q)* that a transferer by mere delivery of a negotiable instrument, made or become payable to bearer, is not in general liable, either on the instrument, or on the consideration. He, therefore (unless in the excepted cases), requires no notice of dishonor.

But we have also seen, that if the bill or note payable to bearer were delivered on account of a pre-existing debt, that delivery is not *prima facie*, a sale of the bill or note. On dishonor, therefore, of the bill or note, the liability of the transferer for the original debt revives. But in such a case, the transferee will have made the bill or note his own, unless he have given due notice of dishonor.

And we have further seen, that as there may be an express contract that the instrument shall not amount to payment, if dishonored, so there are many circumstances from which a jury may infer that the intention and understood contract of the parties was, that the instrument was not to be payment, if dishonored. *(r)*

*It is conceived, that in all cases where, in consequence of [*230] the dishonor of bills or notes, made or become payable to bearer, a remedy arises on the consideration, the transferer is entitled to notice of dishonor. *(s)*

M. & M. 520, S. C.; *Swinyard v. Bowes*, 5 M. & Sel. 62. But a notice has been held to be in time, although an allowance be made for its transmission through a party not indorsing. See *Clode v. Bayley*, 12 M. & T. 51.

(q) Ante, p. 122, 123.

(r) "If a person," says Abbott, C. J., "deliver a bill to another without indorsing his own name upon it, he does not subject himself to the obligations of the law merchant; he cannot be sued on the bill, either by the person to whom he delivers it, or by any other. And, as he does not subject himself to the obligations, we think he is not entitled to the advantages. If the holder of a bill sell it without his own indorsement, he is, generally speaking, liable to no action in respect of the bill. If he deliver it without his indorsement upon any other consideration, antecedent or concomitant, the nature of the transaction, and all circumstances regarding the bill, must be inquired into, in order to ascertain whether he is subject to any responsibility. If the bill be delivered, and received as an absolute discharge, he will not be liable; if otherwise, he may be. The mere fact of receiving such a bill does not show it was received in discharge." *Van Wart v. Woolley*, 2 B. & C. 445, E. C. L. R. vol. 9.

(s) There is great confusion in the cases upon this subject, but the authorities are canvassed in the judgment of Mr. Justice Coleridge, in *Turner v. Stones*, 1 Dow. & by him without indorsing it, is not entitled to notice of its dishonor. *Van Wart v. Smith*, 1 Wendell, 219.

A man merely guaranteeing the payment of a bill, but not a party to it, is not discharged by the neglect of the holder to give him notice of dishonor, unless he has been actually prejudiced by such neglect.(t)(1)

And though a man indorse a bill, yet if he also gives a bond conditioned for its payment, absence of due notice of dishonor is no plea to an action on the bond.(u)

Let us now inquire, seventhly, what are the consequences of neglect to give due notice. The law presumes that, if the drawer has not had due notice, he is injured, because, otherwise, he might have immediately withdrawn his effects from the hands of the drawee, and that, if the indorser has not had timely notice, the remedy against the parties liable to him is rendered more precarious. The consequence therefore, of neglect of notice is, that the party to whom it should have been given is discharged from all liability, whether on the bill or on the consideration for which the bill was paid.(v)(2)

[*231] The old doctrine on this subject was, that it lay on the *defendant to prove that he had been injured by the want of notice;(w) but it is now settled that the want of notice is a complete defence, and that evidence tending to show the defendant was not prejudiced by the neglect, is inadmissible, except in an action against the drawer, who had no effects in the hands of the drawee.(x) And if a man who is discharged for want of notice, nevertheless pays the bill,

L. 131. That learned Judge says, "I think the obligation on the holder is to give notice promptly to the party from whom he receives the note."

(t) *Warrington v. Furber*, 8 East, 242; 6 Esp. 89, S. C.; *Phillips v. Astling*, 2 Taunt. 206; *Swinyard v. Bowes*, 5 Man. & S. 62; *Holbrow v. Wilkins*, 1 B. & C. 10, E. C. L. R. vol. 8; 2 D. & Ry. 59, S. C.; *Van Wart v. Woolley*, 3 B. & C. 439, E. C. L. R. vol. 10; 5 Dowl. & R. 374; M. & M. 220, S. C.; *Walton v. Mascal*, 13 M. & W. 72;* *Hitchcock v. Humfrey*, 5 M. & Gr. 559, E. C. L. R. vol. 44.

(u) *Murray v. King*, 5 B. & Ald. 165, E. C. L. R. vol. 7.

(v) *Bridges v. Berry*, 3 Taunt. 130.

(w) *Mogadara v. Holt*, 1 Show. 317; 12 Mod. 15, S. C.

(x) *Dennis v. Morrice*, 3 Esp. 158; *Hill v. Heap*, D. & R., N. P. C. 57, E. C. L. R. vol. 16.

(1) *Donley v. Camp*, 22 Alabama, 659.

(2) Where the drawer of a check not paid on presentment has been injured for want of notice of such non-payment, he is not thereby discharged from the payment of the whole check, but only to the extent of the actual injury he has sustained by the want of notice. *Pack v. Thomas*, 13 Smedes & Marshall, 11. See ante, the difference between checks and other negotiable paper.

he cannot recover against prior parties. But where an agent drew a bill on his principal for goods bought by the agent for the principal, and the bill was dishonored, of which the agent had no notice, but the agent being afterwards arrested on the bill, paid it, and sued his principal on the contract of indemnity, which the law implies in favor of the agent in such cases; it was held, that the agent's not having insisted on the absence of notice as a defence to the action against himself, did not preclude him from recovering the amount of the bill against his principal.(y)

But eighthly, and lastly, there are cases in which notice is excused or waived.

Notice may be dispensed with and excused by a prior agreement on the part of the party otherwise entitled to it, that it shall not be necessary to give him notice. Thus, where the drawer stated to the holder a few days before the bill became due that he would call and see if the bill had been paid by the acceptor, it was held that he had dispensed with notice.(z)

Where the drawer has countermanded payment, notice of dishonor to him is dispensed with, although it may be still necessary to present.(a)

If the drawer had no effects at any time during the currency of the bills in the hands of the acceptor, and will have no remedy against the acceptor or any other person if he be obliged to pay the bill, he cannot, in general, have been prejudiced by want of notice,(1) and, therefore, cannot set that up *as a defence.(b) But this decision, substituting knowledge for notice, has been much regret- [*232]

(y) *Huntley v. Sanderson*, 1 C. & M. 467, E. C. L. R. vol. 41; 3 Tyr. 469, S. C.

(z) *Phipson v. Kneller*, 4 Camp. 285; 1 Stark. 116, E. C. L. R. vol. 2, S. C.; see *Burgh v. Legge*, 5 M. & W. 418,* and *Brett v. Levett*, 13 East, 214; but see *Ex parte Bignold*, 1 Deac. 728; *Murray v. King*, 5 B. & Ald. 165, E. C. L. R. vol. 7; *Soward v. Palmer*, 2 Moore, 274; 8 Taunt. 277, E. C. L. R. vol. 4, S. C.

(a) *Hill v. Heap*, D. & R., N. P. Ca. 57; *Prideaux v. Collier*, 2 Stark. 57.

(b) *Bickerdike v. Bollman*, 1 T. R. 406; see *Lafitte v. Slatter*, post, 234.

(1) If the drawer has no funds in the drawee's hands, the payee may sue immediately after non-acceptance without giving notice. *Baker v. Gallagher*, 1 Washington C. C. 461; *Read v. Wilkinson*, 2 Washington, C. C. 514; *Tarver v. Nance*, 5 Alabama, 712; *Hubble v. Fogartie*, 3 Richardson, 413.

ted. "I have always thought," says Abbott, C. J., "that it would have been better never to have considered knowledge as equivalent to notice: I cannot consent to carry the law one step further."^(c) Therefore it has been held, that, in order to be liable without notice, the drawer must have had no remedy against the acceptor or any other person. Hence, if a bill be drawn for the accommodation, not of the drawer, but of the acceptor, as the drawer might sue the acceptor, he is entitled to notice.^(d) And if the drawer in such a case chooses to pay without notice, he cannot sue the acceptor for *money paid* to his use, although he may sue on the bill.^(e) And, where a bill was drawn for the accommodation of an indorser, and neither such indorser nor the drawer had any effects in the hands of the acceptor, it was held that a subsequent indorsee, in order to recover against the drawer, was bound to give him notice, for the drawer had a remedy over against his immediate indorser.^(f)(1) So, it is no excuse for neglect of notice *to an indorser*, that the drawer had no effects in the acceptor's hands. "That circumstance," says Lord Kenyon, "will not avail the plaintiff,—the rule extends only to actions brought

(c) *Cory v. Scott*, 3 B. & Ald. 619, E. C. L. R. vol. 5; *Carter v. Flower*, 16 M. & W. 749.*

(d) *Ex parte Heath*, 2 Ves. & Beam. 240; 2 Rose, 141, S. C.; *Cory v. Scott*, 3 B. & Ald. 619, E. C. L. R. vol. 5; Bayley, 294, 5th ed.; *Sleigh v. Sleigh*, 19 L. J. 345, Exch.

(e) *Sleigh v. Sleigh*, 19 L. J. Exch. 345.

(f) *Norton v. Pickering*, 8 B. & C. 610, E. C. L. R. vol. 15; 3 Man. & R. 23; *Dans. & L.* 210, S. C.; *Cory v. Scott*, 3 B. & Ald. 619, E. C. L. R. vol. 5, overruling *Walwyn v. Quintin*, 1 B. & P. 652; and see *Brown v. Maffey*, 15 East, 216. See *Ex parte Heath*, 2 Ves. & Beam. 249; 2 Rose, 141, S. C.

(1) The indorser of a promissory note for the accommodation of the drawer, is entitled to strict notice. *French v. Bank of Columbia*, 4 Cranch, 141; *Bogg v. Keil*, 1 Missouri, 743; *Holland v. Turver*, 10 Conn. 308; *Rea v. Dorrance*, 6 Shepl. 137.

The maker of a note for the accommodation of the payee is not released by the failure to protest the note and give him notice; though it is known to the holder that he is an accommodation maker. *Hansbrough v. Gray*, 3 Gratt. 356; *Lewis v. Hanchman*, 2 Barr, 416.

An accommodation drawer of a bill of exchange is entitled to notice of its dishonor, although he had no funds in the hands of the drawee. *Sherrod v. Rhodes*, 5 Alabama, 683; *Reid v. Morrison*, 2 Watts & Serg. 401; *Evans v. Norris*, 1 Alabama, 511; *Shirley v. Fellowes*, 9 Porter, 300.

An indorser is chargeable without notice, if he indorsed for the drawer's accommodation only, and had no expectation that the drawee would pay. *Farmers' Bank v. Van Meter*, 4 Rand. 553.

against the drawer; the indorser is in all cases entitled to notice, for he has no concern with the accounts between the drawer and the drawee.”(g) Nor will the absence of effects in the hands of the maker of a *promissory note* be any excuse for want of notice to the indorser, at all events unless the indorser be the person who is to pay, and who has no remedy over against any one;(h) nor will it suffice to allege that he has not been damnified by the absence of notice. An intimation from the drawee that he cannot meet the bill, but that the drawer must take it up, will not relieve the holder from the necessity of *giving the drawer notice.(i) But if the acceptor [*233] give the drawer money for that purpose, such sum is recoverable from the drawer by the holder, as money paid to his use.(k) Though the acceptor, at the time of dishonor, have no effects of the drawer in his hands, yet, if he ever had any after the drawing of the bill, or if, without effects, the drawer had any reasonable ground for expecting that the bill would be honored, he is entitled to notice. “The case of *Bickerdike v. Bollman*,” says Lord Ellenborough, “went upon the ground, that the drawer had no effects in the hands of the drawee *at the time of the bill drawn*, and the other cases followed on the same ground. But no case has gone the length of extending the exemption further to cases where the drawee had effects of the drawer in his hands at the time of the bill drawn, though the balance might vary afterwards, and be turned into the opposite scale. When there are no effects of the drawer in the hands of the drawee at the time when the bill is drawn, the drawer must know that he is drawing on accommodation; but, if he have effects at the time, it would be very dangerous and inconvenient, merely on account of the shifting of a balance, to hold notice not to be necessary. It would be introducing a number of collateral issues in every case upon a bill of exchange, to examine how the account stood between the drawer and the drawee, from the time the bill was drawn down to the time it was dishonored.”(l) Where the drawer had goods in the hands of drayees

(g) *Wilks v. Jacks*, Peake, 202. But if the indorser have had funds put into his hands by the drawer out of which he is to pay the bill, notice to the indorser is unnecessary. *Corney v. Mendez da Costa*, 1 Esp. 302; *Carter v. Flower*, 16 M. & W. 751.*

(h) *Carter v. Flower*, 16 M. & W. 751.*

(i) *Stables v. O’Kines*, 1 Esp. 332.

(k) *Baker v. Birch*, 3 Camp. 107.

(l) *Orr v. Maginnis*, 7 East, 359; 2 *Smith*, 328, S. C.; *Legge v. Thorpe*, 12 East, 171; *Brown v. Maffey*, 15 East, 216; *Hammond v. Dufrene*, 3 Camp. 145; *Thackray v. Blackett*, 3 Camp. 164.

to the amount of 1500*l.*, but owed them 10,000*l.*, and the drawees had appropriated the goods to the satisfaction of the debt, it was held, that notice of dishonor to the drawer was still essential: Lord Ellenborough observing: "If a man draws upon a house with whom he has no account, he knows that the bill will not be accepted; and, therefore, he is not entitled to such notice. But the case is quite otherwise where the drawer has a fluctuating balance in the hand of the drawee. There notice is peculiarly requisite. Without this, how can the drawer know that credit has been refused him, and that his bill had been dishonored? It is said here, that the effects in the hands of the drawees were all appropriated to discharge their own debt; but that appropriation should appear by writing,^(m) and the defendant should be a party to it."⁽ⁿ⁾

[*234] *And, in general, though the drawer had no effects in the hands of the drawee, yet, if he had any reasonable expectation that the bill would be honored, he is entitled to notice of dishonor, as if he have consigned goods to the drawee, though, in fact, they never came to hand, or have accepted bills for him.^(o) So, where R., being indebted to the drawer, represented to him that A. owed him money, and the drawer in consequence drew a bill on A., which A. accepted, but did not pay, it was held, that the drawer was entitled to notice of dishonor; for he had reason to expect either that R. would take up or that the acceptor would pay the bill, and might, by want of notice be induced to relax in his endeavors to procure payment of the debt owing by R.^(p) But the drawer of a bill, who has no effects in the hands of the drawee, except that he has supplied him with goods on credit, which credit does not expire till long after the bill becomes due, is not entitled to notice, for goods are not such as can properly be set against the drawing, nor can there be any

(*m*) Quære as to the necessity of a writing.

(*n*) *Blackhan v. Doren*, 2 Camp. 503.

(*o*) *Legge v. Thorpe*, 12 East, 171; *Rucker v. Hiller*, 16 East, 43; 3 Camp. 217, S. C.; *Spooner v. Gardiner*, 1 R. & M. 84, E. C. L. R. vol. 21; *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652; *Ex parte Heath*, 2 Ves. & Beam. 240.

(*p*) *Lafitte v. Slatter*, 6 Bing. 623, E. C. L. R. vol. 19; 4 M. & P. 457, S. C. The burden of proving that the defendant has been injured by receiving no notice, where that is alleged, but where it is proved that he had no funds in the hands of the acceptor, lies on the defendant. *Fitzgerald v. Williams*, 6 Bing. N. Ca. 68, E. C. L. R. vol. 37; 8 Scott, 271, S. C.

reasonable expectation that the bill will be paid till the expiration of the credit.(q)(1)

(q) *Claridge v. Dalton*, 4 M. & Sel. 226. As to the form of the allegation in pleading, see *Thomas v. Fenton*, 16 L. J. 362, Q. B.; 5 D. & L. 28, S. C.

(1) If the drawer had no effects in the hands of the drawee at the date of the bill, and no reasonable ground to expect it would be honored, he is chargeable without notice. *Hopkirk v. Page*, 2 Brockenb. 20; *Eichelberger v. Finley*, 7 Harris & Johns. 381; *Warder v. Tucker*, 7 Mass. 452; *Valk v. Simmons*, 4 Mason, 113; *Cathell v. Goodwin*, 1 Har. & Gill, 468; *Hoffman v. Smith*, 1 Caines, 157; *Savage v. Merle*, 5 Pick. 88; *Armstrong v. Gay*, 1 Stewart, 175; *Dollfus v. Frosch*, 1 Denio, 367; *Foard v. Womack*, 2 Alabama, 368; *Kinsley v. Robinson*, 21 Pick. 327; *Cook v. Martin*, 5 Smedes & Marshall, 379; *Spear v. Atkinson*, 1 Iredell, 262; *Rhett v. Poe*, 2 Howard U. S. 457; In the matter of *Brown*, 2 Story, 502; *Stewart v. Desha*, 11 Alabama, 844; *Younge v. Ruff*, 3 Strobbart, 311; *Richie v. M'Coy*, 13 Smedes & Marshall, 541.

The drawer is entitled to notice of the dishonor of a bill, if he had reasonable ground to believe it would be honored, though he had no funds in the drawee's hands. *Austin v. Rodman*, 1 Hawks, 195; *Stanton v. Blossom*, 14 Mass. 116; *French's Ex. v. Bank of Columbia*, 4 Cranch, 141; *Robinson v. Ames*, 20 Johns. 146; *Grosvenor v. Stone*, 8 Pick. 83; *Campbell v. Pettengill*, 7 Greenleaf, 126; *Hill v. Norris*, 2 Stewart & Porter, 114.

Though the drawer has no funds in the hands of the drawee and no ground to expect the bill to be honored, yet the indorser is entitled to notice in all cases, unless he has received funds from the drawer to take up the bill. *Scarborough v. Harris*, 1 Bay, 178; *Barton v. Baker*, 1 Serg. & Rawle, 334; *Warder v. Tucker*, 7 Mass. 452; *Fotheringham v. Price's Ex.*, 1 Bay, 291; *Denniston v. Imbrie*, 3 Wash. C. C. 401; *Ramdulollday v. Darioux*, 4 Ibid. 61; *Walker v. Walker*, 2 English, 542. An indorser of a promissory note, who before the note falls due, takes an assignment of all the property and estate of the maker, for the express purpose of meeting his responsibilities, is not entitled to the usual notice of non-payment. *Mechanics' Bank v. Griswold*, 7 Wend. 165; *Barton v. Baker*, 1 Serg. & Rawle, 334; *Coddington v. Davis*, 3 Denio, 16, 610; *Duvall v. Farmers' Bank*, 9 Gill & Johns. 31.

The mere taking of security by an indorser from the maker of the note does not dispense with a demand and notice, unless sufficient funds have come into his hands to satisfy the note, or all the property of the maker has been transferred to the indorser. *Spencer v. Harvey*, 17 Wendell, 489; *Marine Bank v. Smith*, 6 Shepl. 99; *Cramer v. Perry*, 17 Pick. 332; *Woodman v. Eastman*, 10 N. Hamp. 359; *Durham v. Price*, 5 Yerg. 300; *Watkins v. Crouch*, 5 Leigh, 522; *Watt v. Mitchell*, 6 Howard (Miss.) Rep. 131; *Barrett v. Charleston Bank*, 2 McMullan, 191; *Kramer v. Sanford*, 4 Watts & Serg. 328; *Burrows v. Hannegan*, 1 McLean, 309; *Stephenson v. Primrose*, 8 Porter, 155; *Kyle v. Green*, 14 Ohio, 495; *Denny v. Palmer*, 5 Iredell, 610; *Develing v. Ferris*, 18 Ohio, 170.

The burden of proof is on the holder of a bill, to show that the drawer had no funds in the drawee's hands in order to excuse want of notice. *Baxter v. Graves*, 2 Marshall, 152; *Ralston v. Bullits*, 3 Bibb, 261; *Thompson v. Stewart*, 3 Conn. 172.

Where the indorser has discharged the maker of a note from liability by a settle-

If the drawer of a bill make it payable at his own house, this is evidence to go to the jury that it is a bill drawn for the accommodation of the drawer himself, of the dishonor of which it is not necessary to apprise him. "I cannot understand," says Lord Tenterden, "why the drawer should with his own hand make the bill payable at his own house, unless he was to provide payment of it when at maturity."(*r*)

Ignorance of a party's residence will excuse neglect to give notice of dishonor, so long as that ignorance continues without neglecting to use the ordinary means for acquiring information. "It would be very hard," observes Lord Ellenborough, "when the holder of a bill [*235] does not know where the indorser *is to be found, if he lost his remedy by not communicating immediate notice of dishonor of the bill; and, I think, the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive and contented ignorance: but, if he uses reasonable diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered, is due notice of the dishonor of the bill, within the usage and custom of merchants."(*s*) Where the holder, in order to discover the residence of the indorser, had made inquiries at a certain house where the bill was made payable, Lord Ellenborough said, "Ignorance of the indorser's residence may excuse the want of due notice, but the party must show that he has used reasonable diligence to find it out. Has he done so here? How should it be expected that the requisite information should have been obtained where the bill was payable? Inquiries might have been made of the other persons, whose names appeared on the bill, and application might have been made to persons of the same name with the defendant, whose

(*r*) *Sharp v. Bailey*, 9 B. & C. 44, E. C. L. R. vol. 17; 4 M. & R. 4, S. C. Quære, whether notice of dishonor be necessary where the drawer dies before maturity, and an indorser is sued who is the drawer's executor. See *Caunt v. Thompson*, 18 L. J. 127, C. P.; 7 C. B. Rep. 400, E. C. L. R. vol. 62, S. C.

(*s*) *Bateman v. Joseph*, 2 Camp. 463; 12 East, 433, S. C.; *Browning v. Kinnear*, Gow, 81; *Harrison v. Fitzhenry*, 3 Esp. 240; *Baldwin v. Richardson*, 1 B. & C. 245, E. C. L. R. vol. 8; 2 D. & R. 285, S. C. In this last case the traveller of a tradesman received in the course of business a promissory note, which was afterwards dishonored. The principal, not knowing the address of the next preceding indorser, wrote to his traveller to inquire into it, and several days elapsed before he received an answer. He then gave notice, and it was held sufficient. See *Chapcott v. Curlew*, 2 Moo. & Rob. 484.

ment and release, a notice of non-payment would be of no use to him, and therefore he is not entitled to it. *Burke v. McKay*, 2 Howard U. S. Rep. 66.

addresses are set down in the directory.”(t) Due diligence has, however, been held to be a question of fact.(u) After the residence of the party is discovered, the holder has the same time to give notice, as he would have had in the first instance.(v)(1)

Nemo ad impossibile tenetur: and, therefore, it should seem, on general principles, that the death or dangerous illness of the holder or his agent, or other accident not attributable to the holder's negligence, rendering notice impossible, may excuse it.(w) But, where an indorser left home on account of the dangerous illness of his wife, at a distance, and a letter, *containing notice of dishonor of [*236] a bill, lay unopened at his shop during his absence, till after the proper time for giving his indorser notice, Lord Ellenborough held, that these circumstances afforded no excuse for the delay.(x)(2)

(t) *Beveridge v. Burgis*, 3 Camp. 262.

(u) *Bateman v. Joseph*, 12 East, 433; 2 Camp. 463, S. C.; *Hilton v. Shepherd*, 6 East, 14 n.; *Siggers v. Browne*, 1 M. & Rob. 520; *Hewitt v. Thomson*, 1 M. & Rob. 543. In these two last cases, the letters containing notice of dishonor had miscarried, and the jury were directed to consider whether the generality or indistinctness of the description which the defendant had given of himself in the bill, had led the plaintiff into error.

(v) *Firth v. Thrush*, 8 B. & C. 387, E. C. L. R. vol. 15; 2 M. & R. 359; *Dans. & L.* 151, S. C.; 17 L. J. 294, Ex.

(w) *Poth.* 144; *Pardessus du Contrat de Change*, 426; *Thompson*, 483, 548.

(x) *Turner v. Leech*, *Chit.* 9th ed. 330.

(1) Where the holder of a bill of exchange after the exercise of due diligence to ascertain the residence of the indorser, sends him a notice of the dishonor of the bill, and afterwards discovers that he was not rightly informed and ascertains the true residence, it is not necessary for him to send another notice. *Lambert v. Ghiselin*, 9 Howard, U. S. 552.

What is diligence? see *Shepard v. Citizens Ins. Co.*, 8 Missouri, 272; *Planters' Bank v. Bradford*, 4 Humphrey, 39; *Brener v. Wightman*, 7 Watts & Serg. 264; *Rhett v. Poe*, 2 Howard U. S. 157; *Carroll v. Upton*, 2 Sandf. Sup. Ct. Rep. 171; *Rawdon v. Redfield*, *Ibid.* 178; *Carroll v. Upton*, 3 Comstock, 272; *Lambert v. Ghiselin*, 9 Howard U. S. 552; *Johnson v. Lewis*, 1 Dana, 182; *Davis v. Herrick*, 6 Ham. 55; *Bank of Columbia v. Lawrence*, 1 Peters, 578; *Van Hoesen v. Van Alstyne*, 3 Wend. 75; *Sice v. Cunningham*, 1 Cowen, 397; *Nash v. Harrington*, 1 Aiken, 39; *Bronaugh v. Scott*, 5 Call, 78; *Harris v. Robinson*, 4 Howard, U. S. Rep. 336; *Godley v. Goodlove*, 6 Smedes & Marshall, 255; *Pierce v. Pendar*, 5 Metc. 352; *Wheeler v. Field*, 6 Metc. 290; *Thorne v. Rice*, 3 Shepl. 263; *Spencer v. Bank*, 3 Hill, 520; *Winans v. Davis*, 3 Harrison, 276; *Hoopes v. Newman*, 2 Smedes & Marsh. 71; *Godley v. Goodlove*, 6 *Ibid.* 255; *Remer v. Downer*, 23 Wend. 620; 25 *Ibid.* 277; *Belden v. Lamb*, 17 Conn. 441; *Haly v. Brown*, 5 Barr, 178.

(2) A state of war between the country of the drawer and that of the drawee will excuse notice, but it must be given within a reasonable time after peace. *Hopkirk v. Page*, 2 Brock. 20.

Where a bill is drawn by several persons upon one of themselves, since the acceptor is likewise a drawer, notice of dishonor is superfluous, as the dishonor must be known to one of them, and the knowledge of one is the knowledge of all.(y)(1)

The death, bankruptcy, or insolvency of the drawee, however notorious, constitutes no excuse for neglect of notice.(z)(2) Nor an agreement or understanding between the parties, that the instrument shall not be payable till after a certain event.(a)

Notice of dishonor need not be given if the bill be on an insufficient stamp.(b)

Nor to the indorser of a promissory note not negotiable.(c)(3)

(y) *Porthouse v. Parker*, 1 Camp. 82. But in case of fraud a different rule would prevail. *Bignold v. Waterhouse*, 1 M. & Sel. 259. And it may be doubted how far this rule would hold in case of a joint stock company.

(z) *Russel v. Langstaffe*, Doug. 497; *Esdaile v. Sowerby*, 11 East, 114; *Boulbee v. Stubbs*, 18 Ves. 21; but see 3 Bro. C. C. 1.

(a) *Free v. Hawkins*, 8 Taunt. 92, E. C. L. R. vol. 4; 1 Moore, 28, S. C.

(b) *Cundy v. Marriot*, 1 B. & Ad. 696, E. C. L. R. vol. 20.

(c) *Plimley v. Westley*, 2 Bing. N. C. 249, E. C. L. R. vol. 29; 2 Scott, 423; 1 Hodges, 324, S. C.

(1) If the drawer be a partner of the firm on which the bill is drawn, the holder need not prove notice to him of its dishonor. *Gowan v. Jackson*, 20 Johns. 176; see *Dwight v. Scavil*, 2 Conn. 654.

(2) The insolvency and absconding of the drawer are no excuse for not giving notice to the indorser. *May v. Coffin*, 4 Mass. 341; *Barton v. Baker*, 1 Serg. & Rawle, 334; *Gibbs v. Cannon*, 9 Serg. & Rawle, 201; *Hunt v. Wadleigh*, 13 Shepl. 271; see *McClellan v. Clark*, 2 Brevard, 106; *Kiddell v. Ford*, 3 Ibid. 178; *Lawrence v. Langley*, 14 N. Hamp. 70.

(3) The indorsement of a note not negotiable is a collateral and not an original undertaking. If by the payee he will be holden as indorser, but if by a person not a party to the note, as guarantor, but in both cases demand and notice is necessary to hold the indorser. *Parker v. Riddle*, 11 Ohio, 102.

If a note is indorsed, however long a time after it becomes due, the indorsee is bound to prove a demand and notice in an action against the indorser. *Berry v. Robinson*, 9 Johns. 121; *Stackman v. Riley*, 2 McCord, 398; *Allwood v. Haseldon*, 2 Bailey, 457; *Poole v. Jolleson*, 1 McCord, 199; *Rugeby v. Davidson*, 2 Rep. Con. Ct. 33; *Dwight v. Emerson*, 2 N. Hamp. 159; *Kennan v. McRae*, 3 Stewart & Porter, 249; *Benton v. Gibson*, 1 Hill, S. C. 56; *Greeley v. Hunt*, 8 Shepl. 455; *Colt v. Barnard*, 18 Pick. 260; *Kirkpatrick v. McCullough*, 3 Humph. 171; *Kennon v. McRae*, 7 Porter, 175; *Chadwick v. Jeffers*, 1 Richardson, 397; *Bean v. Arnold*, 4 Shepl. 251; *Williams v. Brobst*, 10 Watts, 111; *Matthews v. Fogg*, 1 Richardson, 369; *Gray v. Bell*, 2 Ibid. 67; 3 Ibid. 71; *Sanborn v. Southard*, 25 Maine, 409; *Branch Bank v. Gaffney*, 9 Alabama, 153.

The consequence of neglect of notice will be waived, by a subsequent promise to pay. And a payment of part, or an acknowledgment of liability, *(d)* though after an action brought, *(e)* will be *evidence* of notice. *(f)*

It makes no difference that such promise, payment, or acknowledgment were made under a misapprehension of the *law*, for every man must be taken to know the law; *(g)* otherwise, *a premium is held out to ignorance, and there is no telling to what extent [*237] this excuse might be carried. *(h)* But, if the promise or acknowledgment be made under a misapprehension of *fact*, as, if the bill have been presented for acceptance, and acceptance having been refused, a promise to pay, in ignorance of that circumstance, is no waiver of the consequence of *laches*. *(i)* But a promise to pay will entirely dispense with proof of presentment or notice, and will throw on the defendant the double burden of proving *laches*, and that he was ignorant of it. *(k)* Where it is only as to part of the sum, the plaintiff can only avail himself of it as waiver, *pro tanto*. A drawer of a bill for 200*l.*, who has not received due notice of dishonor, said, "I do not mean to insist on want of notice, but I am only bound to pay you 70*l.*" Abbott, C. J.: "The defendant does not say that he will pay the bill, but that he is only bound to pay 70*l.* I think the plaintiff must be satisfied with the 70*l.*" *(l)* The acknowledgment or

(d) Vaughan v. Fuller, 2 Stra. 1246; Horford v. Wilson, 1 Taunt. 12; Lundy v. Robertson, 7 East, 231; 3 Smith, 225, S. C.; Brett v. Levett, 13 East, 213; Wood v. Brown, 1 Stark. 217, E. C. L. R. vol. 2; Hopes v. Alder, 6 East, 16, n.; Dennis v. Morrice, 3 Esp. 158; Rogers v. Stephens, 2 T. R. 713; Dixon v. Elliott, 5 C. & P. 437, E. C. L. R. vol. 24; Margetson v. Aitken, 3 C. & P. 338, E. C. L. R. vol. 14; Dans. & L. 157, S. C.

(e) Hopley v. Dufresne, 15 East, 275.

(f) Many of the cases, cited below, fail in drawing the distinction between the use of a promise, as a *waiver* of notice, and its use as *evidence* of notice, post, 237, note *(k)*.

(g) Or, more correctly speaking, ignorance of law cannot excuse.

(h) Bilbie v. Lumley, 2 East, 469.

(i) Goodall v. Dolley, 1 T. R. 712; Blesard v. Hurst, 5 Burr, 2672; Williams v. Bartholomew, 1 B. & P. 326; Stevens v. Lynch, 2 Camp. 333; 12 East, 38, S. C.

(k) Taylor v. Jones, 2 Camp. 105; Stevens v. Lynch, 12 East, 38; 2 Camp. 332, S. C. See instances of promises held insufficient in Dennis v. Morrice, 3 Esp. 158; Cumming v. French, 2 Camp. 106, n.; and see Rouse v. Redwood, 1 Esp. 156; Standage v. Creighton, 5 C. & P. 406, E. C. L. R. vol. 24; and Borradaile v. Lowe, 4 Taunt. 93, where it is said that an indorser can only be rendered liable by an express promise; and see Pickin v. Graham, 1 Cro. & Mee. 725; * 3 Tyr. 923, S. C.

(l) Fletcher v. Froggatt, 2 C. & P. 569, E. C. L. R. vol. 12.

promise may be made by the attorney for the defendant, or by his clerk, who has the management of the case.^(m) It need not be made to the plaintiff, but may be made to another party to the bill, or to a stranger.⁽ⁿ⁾ A promise to pay made by the drawer in expectation that a bill will be dishonored, but before it is dishonored, does not dispense with notice, for it is to be understood as a promise on condition that due notice is given.^(o)

It seems, however, in some recent cases to have been considered, that a promise to pay is only evidence from which a jury may presume that notice has been received.^{(p)(1)}

(m) *Standage v. Creighton*, 5 C. & P. 406, E. C. L. R. vol. 24.

(n) *Potter v. Rayworth*, 13 East, 417; *Gunson v. Metz*, 1 B. & C. 193, E. C. L. R. vol. 8; 2 D. & Ry. 334, S. C.; *Fletcher v. Froggatt*, 2 C. & P. 569, E. C. L. R. vol. 12.

(o) *Pickin v. Graham*, 1 C. & Mee. 725; * 3 Tyr. 923, S. C.; and see *Prideaux v. Collier*, 2 Stark. N. P. C. 57, E. C. L. R. vol. 3; and *Baker v. Birch*, 3 Camp. 107.

(p) *Hicks v. The Duke of Beaufort*, 4 Bing. N. C. 229, E. C. L. R. vol. 33; 5 Scott, 598, S. C.; and see *Booth v. Jacobs*, 3 Nev. & M. 351, E. C. L. R. vol. 28; *Pickin v. Graham*, 1 Cro. & Mee. 728; * 3 Tyr. 923, S. C.; but see *Lundie v. Robertson*, 7 East, 231; 3 Smith, 225, S. C.; *Haddock v. Bury*, 7 East, 236, n.; *Anson v. Bayley*, B. N. P. 276; *Hopley v. Dunfresne*, 15 East, 275; *Norris v. Solomonson*, 4 Scott, 257; where defendant said he had no intention but to pay the bill, and should not avail himself of the informality of the notice, held evidence to go to the jury of notice. *Brownell v. Bonney*, 1 Q. B. Rep. 39, E. C. L. R. vol. 41.

(1) When it appears that the holder of negotiable paper has been guilty of laches in an action against an indorser or drawer, the holder cannot recover on a subsequent promise without showing that it was made with full knowledge of the laches; but where the fact of laches does not appear, a promise after maturity to pay the bill is presumptive proof of demand and notice. *Tebbetts v. Dowd*, 23 Wendell, 379.

A promise made by the drawer to the payee to pay the same, after a legal discharge by want of notice of its dishonor, is, if made with a full knowledge of the facts, binding upon him. *Cram v. Sherburne*, 2 Shepl. 48; *Walker v. Walker*, 2 English, 542; *Hopkins v. Liswell*, 12 Mass. 52; *Martin v. Ingersoll*, 8 Pick. 1; *Beck v. Thompson*, 4 Har. & Johns. 531; *Ladd v. Kenney*, 2 N. Hamp. 340; *Thornton v. Wynn*, 12 Wheat. 183; *Robbins v. Pinckhard*, 5 Smedes & Marsh. 51; *Moore v. Tucker*, 3 Iredell, 347; *Gardiner v. Jones*, 2 Murp. 429; *Barkalow v. Johnson*, 1 Harrison, 397; *Farrington v. Brown*, 7 N. Hamp. 271; *Cram v. Sherburne*, 2 Shepl. 48; *Davis v. Gowen*, 5 Shepl. 387.

A part payment, a promise to pay, or an acknowledgment of liability, by the indorser of a promissory note, after the note becomes due, is *prima facie* evidence not only of notice but of presentment. *Bank of the U. S. v. Lyman*, 20 Vermont, 668; *Bibb v. Peyton*, 11 Smedes & Marshall, 275; *Ridgway v. Day*, 13 Penna. St. Rep. 208.

A part payment of a note by the indorser, not explained or qualified by any accompanying circumstances, will be held sufficient evidence of waiver of notice. But

*Though a party may waive the consequence of *laches*, in respect of himself, he cannot do so in respect of antecedent parties. (q) [*238]

No *laches* can be imputed to the Crown, and, therefore, if a bill be seized under an extent before it is due, the neglect of the officer of the Crown to give notice of the dishonor will not discharge the drawer or indorsers. (r)

(q) *Roscow v. Hardy*, 12 East, 434; *Turner v. Leach*, 4 B. & Ald. 451, E. C. L. R. vol. 6; *Marsh v. Maxwell*, 2 Camp. 210, n., and see ante, p. 231.

(r) *West on Extents*, 28-9.

where the payment is made with the money of the maker and by his request, the indorser acts as mere agent of the maker, and the transaction is so qualified and explained as to preclude all idea of an actual or intended waiver on the part of the indorser. *Whitaker v. Morrison*, 1 Branch, 25.

A promise in ignorance of the fact that no notice has been given will not be sufficient. *Crain v. Colwell*, 8 Johns. 384; *Jones v. Savage*, 6 Wendell, 658; *Offit v. Vick*, Walker, 99; *Miller v. Hadley*, Anthon, 68; *Fleming v. McClure*, 1 Brevard, 428; *Hunt v. Wadleigh*, 13 Shepl. 271; *Warder v. Tucker*, 7 Mass. 449; *Freeman v. Boynton*, Ib. 483; *Garland v. Salem Bank*, 9 Ib. 408; *May v. Coffin*, 4 Ib. 341; *Otis v. Hussey*, 3 N. Hamp. 346; *Trimble v. Thorn*, 16 Johns. 152; *Kennon v. McRea*, 7 Porter, 175; *U. S. Bank v. Southard*, 2 Harrison, 473; *Spurlock v. Union Bank*, 4 Humph. 336.

Whether particular conversations amount to a waiver of notice of refusal to accept, is a question for the jury. *Carmichael v. Pennsylvania Bank*, 4 Howard, Miss. 567.

If the indorser, after the maturity of the bill, even supposing himself liable to pay the same, takes security from the maker, this will not amount to a waiver of the objection of want of due presentment or notice; but the indorser will be deemed to have taken the security merely contingently in case of his ultimate liability. *The Otsego County Bank v. Warren*, 18 Barbour, S. C. Rep. 290.

An agreement by the drawer and indorser with the holder before the bill is due, that the holder should take any security that the acceptor could give, or make any arrangement he might deem proper to receive payment, without affecting their liabilities, was held not to dispense with demand and notice. *Bank v. Spell*, 2 Hill, 366; *Carter v. Burley*, 8 N. Hamp. 558; *Creamer v. Perry*, 17 Pick. 332.

A declaration by an indorser to a third person that he would pay the note without suit is no waiver of demand and notice. *Allwood v. Haseldon*, 2 Bailey, 457; see *Robbins v. Pinchhard*, 5 Smedes & Marshall, 51.

A waiver of notice of a demand does not dispense with the demand itself. *Backus v. Shiphard*, 11 Wend. 629; *Buchanan v. Marshall*, 22 Vermont, 561; *Drinkwater v. Tibbits*, 5 Shepl. 16.

A waiver of protest held to be a waiver of demand and notice. *Coddington v. Davis*, 1 Comstock, 186; see *Wall v. Bry*, 1 Louisiana, Ann. Rep. 312; *Scott v. Greer*, 10 Barr, 103; and see ante, p. 171, note.

A prior dispensation with notice, as absence of effects, must be specially alleged in the declaration.(s) So must the impossibility of giving notice, or any other excuse for not giving it.(t) And it is conceived that a subsequent promise, when used as a waiver of notice, must also be specially pleaded. But a subsequent promise to pay, when used as evidence of the fact of notice, need not.(u)

After the bill is due, a promise to pay, or a part payment,(v) or the offer of it,(w) or any admission of liability,(x) is *prima facie* evidence of notice; but though there be no evidence to repel the inference, the jury are not *bound* to draw it.(y) A letter from the defendant, containing no promise of payment, but merely an ambiguous allusion to the bill being dishonored, was held sufficient to warrant the jury in finding that the defendant had received due notice of dishonor.(z) And the sending a person by the defendant, the drawer, to a remote indorser two days after the bill had become due, to inform him that he, the drawer, had been defrauded of the bill, and that he should defend any action upon it, was left by Lord Tenterden to the jury as evidence to prove notice of dishonor.(a) And a statement by the *defendant that he should pay the bill, and not [239] avail himself of the *informality* of the notice, has been held to be evidence of *due* notice.(b) And a conditional promise to pay, although the condition be not complied with, is still evidence.(c)

Notice to produce a notice of dishonor is not necessary.(d)

(s) *Cory v. Scott*, 3 B. & Ald. 624, E. C. L. R. vol. 5; *Burgh v. Legge*, 5 M. & W. 418.*

(t) *Allen v. Edmundson*, 17 L. J. Exch. 293; 2 Ex. 719,* S. C.

(u) *Lundie v. Robertson*, 7 East, 231; *Gibbbon v. Coggon*, 2 Camp. 188. See post, Chapter on *Pleading*.

(v) *Horford v. Wilson*, 1 Taunt. 12.

(w) *Dixon v. Elliott*, 5 C. & P. 437, E. C. L. R. vol. 24.

(x) *Jackson v. Collins*, 17 L. J. 142, Q. B.; *Mills v. Gibson*, 16 L. J. 249, C. P.

(y) *Bell v. Frankis*, 11 L. J., C. P. 300; 4 M. & G. 446, E. C. L. R. vol. 44, S. C.

(z) *Booth v. Jacobs*, 3 Nev. & M. 351, E. C. L. R. vol. 28.

(a) *Wilkins v. Jadis*, 1 Moo. & R. 41; and see *Curlew v. Corfield*, 1 Q. B. Rep. 814, E. C. L. R. vol. 41.

(b) *Brownell v. Bonney*, 1 Q. B. Rep. 39, E. C. L. R. vol. 41.

(c) *Campbell v. Webster*, 15 L. J., 4 C. P.; 2 C. B. Rep. 258, E. C. L. R. vol. 52, S. C.; but see *Pickin v. Graham*, *supra*.

(d) *Swain v. Lewis*, 2 C. M. & R. 261.* See *Doe v. Somerton*, 14 L. J. 210, Q. B.

*CHAPTER XXII.

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OF INTEREST.

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INTEREST, where not made payable on the face of the instrument, (a) is in the nature of damages for the retention of the principal debt.

The general rule of the common law is, that interest is not recoverable unless there were an express stipulation (b) that *the interest should be paid, or unless such be the usage of trade. [*241]

(a) But in an action of debt, if interest be payable by the terms of the instrument, it is recoverable, not as damages, but as a debt. *Watkins v. Morgan*, 6 C. & P. 661, E. C. L. R. vol. 25; *Hudson v. Fossett*, 13 L. J. 141, C. P.; 7 M. & G. 348, E. C. L. R. vol. 49, S. C. As to payment of principal, in full of both principal and interest, see p. 179.

(b) If, at the time of a contract of sale, the vendee agrees to pay by bill or note, and neglects to do so, interest is recoverable as part of the price. *Marshall v. Poole*, 13 East, 98; *Davis v. Smyth*, 8 M. & W. 399.*

To this rule, however, bills and notes always formed an exception, and in most cases carried interest.

And now by the recent statute for the amendment of the law,^(c) interest is recoverable on all debts payable by virtue of a written instrument, and on all other debts after a *written* demand and notice that interest will be claimed from the date of the demand.

Interest is seldom expressly made payable on the face of the instrument, but sometimes it is so.

Where interest is expressly made payable on the face of the instrument, it carries interest from its date, and not merely from its maturity. For unless the words "bearing interest," or other words of similar import, are taken to mean that interest is payable from the date of the instrument, they would be idle, since without any such words the owner of the bill or note would be entitled to interest from its maturity. Thus it has been held, that on a bill drawn payable at a certain period after date *bearing interest*, the plaintiff is entitled to recover interest from the date of the bill.^(d) So where a note was made payable on demand with lawful interest, it was held to carry interest from the date.^(e) So a promissory note, whereby the maker promised to pay, one year after his death, 300*l.* with legal interest, bears interest from the date of the note.^(f)

Where interest is not expressly made payable by the terms of the instrument it runs from the maturity of the bill or note. If the bill or note, not expressly made payable with interest, be payable on demand, interest runs, not from the date of the instrument, but from the time of the demand.^{(g)(1)}

(c) 3 & 4 Wm. 4, c. 42, ss. 28 and 29.

(d) Kennerly v. Nash, 1 Stark. 442, E. C. L. R. vol. 2; Doman v. Dibden, 1 R. & M. 381; Richards v. Richards, 2 B. & Ad. 447, E. C. L. R. vol. 22.

(e) Weston v. Tomlinson, Chitty, 9th ed. 681; Hopper v. Richmond, 1 Stark. 507, E. C. L. R. vol. 2.

(f) Roffey v. Greenwell, 10 Ad. & E. 222, E. C. L. R. vol. 37; 2 Per. & Dav. 365, S. C.

(g) Blaney v. Hendricks, 2 Bla. 761; Cotton v. Horsemanden, Prac. Reg. 357; and see Barough v. White, 4 B. & C. 327, E. C. L. R. vol. 10; 6 D. & Ry. 379; 2 C. & P. 8, S. C.; Parker v. Hutchinson, 3 Ves. 134; King v. Taylor, 5 Ves. 808; Lithgow v. Lyon, 1 Coop. 29; Lowndes v. Collins, 17 Ves. 27.

(1) Patrick v. Clay, 4 Bibb. 246; Schmidt v. Limehouse, 2 Bailey, 276; see Pullen v. Chase, 4 Pike, 210.

Where there has been no demand except the action, interest may be given from the service of the writ of summons.^(h)

*The indorser of a bill or note has been held liable to pay interest only from the time that he receives notice of the dishonor. "The drawer cannot," says Mansfield, C. J., "find out by inspiration who is the holder, and till he finds that out he cannot pay the bill. When he has found out who is the holder, he is bound to pay the bill within a reasonable time. If he does not, he is liable to damages for not performing his contract; those damages are the interest on the bill."⁽ⁱ⁾(1)

Interest was formerly computed only to the commencement of the suit, but it is now carried down to final judgment. "That," says Lord Mansfield, "does the plaintiff complete justice. It is agreeable to the principles of the common law, and interferes with no statute. It takes from the defendant the temptations to make use of all the unjust dilatories of chicanery. For, if interest is to stop at the commencement of a suit where the sum is large, the defendant may gain by protracting the cause in the most expensive and vexatious manner, and the more the plaintiff is injured, the less he will be relieved."^(k)

Where money is paid into Court on a security carrying interest, interest must be paid not merely to the commencement of the action, but to the time of payment into Court,^(l) or the plaintiff may proceed in the action for the difference.^(m)

But in trover the rule formerly was that the plaintiff is entitled to damages equal to the value of the article converted *at the time of the conversion*. And, therefore, in trover for bills or notes, interest was only calculated down to the time of conversion. But now by the 3 &

^(h) *Pierce v. Fothergill*, 2 Bing. N. C. 167, E. C. L. R. vol. 29; 2 Scott, 334, S. C.

⁽ⁱ⁾ *Walker v. Barnes*, 5 Taunt. 240, E. C. L. R. vol. 1; 1 Marsh. 36, S. C.

^(k) *Robinson v. Bland*, 2 Bur. 1077.

^(l) *Mercer v. Jones*, 3 Camp. 477.

^(m) *Kidd v. Walker*, 2 B. & Ad. 705, E. C. L. R. vol. 22.

(1) It is error to calculate interest on the damages allowed in a protested bill of exchange from the maturity of the bill. *Rowland v. Hoover*, 2 Howard (Miss.), 769; *Murphy v. Andrews*, 13 Alabama, 722.

4 Wm. 4, c. 42, the jury may give damages over and above the value of the goods at the time of the conversion.

Interest ceases to run after a tender. Lord Ellenborough: "I think interest ought to stop from the offer to pay."⁽ⁿ⁾

A banker, in charging interest to a customer who has overdrawn his account, should compute it not from the date, but from the payment of the customer's checks.^(o)

[*243] Though the principal have been paid, yet the plaintiff may proceed for interest, and the jury are bound to give it unless it have been incurred by the negligence of the plaintiff.^(p) So where for the amount of the principal on an overdue bill, another bill was given, and afterwards paid, it was held that an action lay on the original bill for the interest.^(q)

We have already observed, that where interest is not payable by the terms of the instrument, it is in the nature of damages. Hence it has been held, that the owner of a bill is not necessarily and invariably entitled to interest, but that where the charge for interest has been incurred by his own negligence, a jury are justified in reducing or withholding it altogether.^(r)

An engagement to give a bill will create a liability to interest on a contract, which would not otherwise carry it. Thus, where goods are sold to be paid for by a bill which is not given, interest is recoverable as part of the price of the goods, and it has been held, that this interest may be recovered in an action for goods sold and delivered.^(s)

A party who guarantees the due payment of a bill is liable for interest.^(t)

(n) *Dent v. Dunn*, 3 Camp. 296.

(o) *Goodbody v. Foster*, Camb. Sum. Ass. 1831, Lyndhurst, C. B.

(p) *Laing v. Stone*, M. & M. 229, n.; 2 M. & Ry. 561, E. C. L. R. vol. 17, S. C.

(q) *Lumley v. Musgrave*, 4 Bing. N. C. 9, E. C. L. R. vol. 33; 5 Scott, 230, S. C.; but see the Chapter on *Payment*, and ante, p. 179.

(r) *Cameron v. Smith*, 2 B. & Ald. 308; *Du Belloix v. Lord Waterpark*, 1 D. & R. 16, E. C. L. R. vol. 16; and see *Dent v. Dunn*, 3 Camp. 296.

(s) *Marshall v. Poole*, 13 East, 98; *Farr v. Ward*, 3 M. & W. 26; * 6 Dowl. 163, S. C.

(t) *Ackerman v. Ehrensperger*, 16 M. & W. 99.*

Where the action goes on to trial the jury assess the interest, the plaintiff's counsel stating the sum which is claimed. Where judgment goes by default in debt, the plaintiff indorses on the writ of execution more than the exact sum due at his peril. In actions of assumpsit the Courts have *the power* of assessing the damages, but in order to inform the conscience of the Courts they usually issue a writ of inquiry. In actions on bills and notes, however, the amount of damages being matter of calculation, the writ of inquiry is supplied by a reference to the Master to compute principal and interest.

The rate of interest allowed is five per cent., but we have [*244] seen that under peculiar circumstances the jury may reduce the rate.

The common indebitatus count for interest is good.(u)

Until recently to contract for or take more than five per cent. interest on any transaction relating to bills or notes was usurious and illegal. Three recent statutes, however,(v) which will be considered in their order, have exempted so large a proportion of the bills and notes in circulation from the operation of the Usury Law, that in a treatise on negotiable instruments the subject of usury is no longer of the same practical importance as formerly. But as the latitude hitherto conceded by the Legislature has its limits, and may be but temporary, it will still be necessary to treat of the law of usury in its operation on bills and notes.

Usury is said to be an indictable misdemeanor at common law.(w)

The stat. 37 Hen. 8, s. 89, repeals all former enactments on this subject, and restrains the legal rate of interest to ten per cent. per annum, imposing a penalty on such as *take* more. This statute was itself repealed in the next reign, by the 5 & 6 Edw. 6, c. 20, which prohibited the taking of any interest whatever. The stat. 13 Eliz. c. 8, repeals the 5 & 6 Edw. 6, c. 20, thereby reviving the first-mentioned statute, and avoids all contracts on which more than eight or ten per cent. is reserved, as usurious. The 21 Jac. 1, reduces the legal rate of interest to eight per cent.; the 12 Car. 2, c. 13, further

(u) *Nordenstrom v. Pitt*, 13 M. & W. 723.*

(v) 3 & 4 Wm. 4, c. 98, s. 7; 1 Vict. c. 80, and 2 & 3 Vict. c. 37.

(w) Com. Dig. Usury.

diminishes it to six per cent. ; and, lastly, the 12 Anne, st. 2, c. 16, reduces it to five per cent. The two last statutes of Anne and Charles are copied almost verbatim from the statute of James, and the statute of James contains substantially the same provisions as the two statutes of Elizabeth and Henry 8, taken together ; so that all the cases on usury since 13 Eliz. are applicable to the present law.

These statutes are to be construed most strongly for the suppression of usury, and the courts will look through the apparent form of a contract and the artifice of parties, at the substance and real nature of the transaction. “Where,” says *Lord Mansfield, “the [*245] real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute.”(x)

The statute 12 Anne, st. 2, c. 16 (as well as the former enactments), contains two distinct provisions :

1. That no person, upon any contract, shall *take, accept, or receive* for the loan of money or other commodities, above the rate of five per cent. per annum, under penalty of forfeiture of treble the money lent ; one half to the crown, and the other moiety to him that will sue for the same.

2. That all bonds, contracts, or assurances, whereby there shall be reserved or taken above the rate of five per cent. per annum, shall be utterly void.

Hence it appears, that to make at once the assurance void and to incur the penalty, the contract must be for usurious interest, and usurious interest must be taken ; but that, on the one hand, the penalty may be incurred without avoiding the contract, and that, on the other, the contract may be avoided without incurring the penalty. Thus, if a bond be given for the payment of a just debt, and it is afterwards agreed that the money secured by the bond shall remain in the hands of the obligor at usurious interest, and such interest be *taken*, the penalty is incurred, but the bond is still good.(y) But if a man *contracts* for usurious, yet *takes* no more than legal interest, the assurance is void, though the penalty is not incurred.(z)

(x) Floyer v. Edwards, Cowp. 114.

(y) Ferral v. Shaen, 1 Saun. 294.

(z) Fisher v. Béasley, 1 Doug. 235. See Serjeant Williams’s note to Ferral v. Shaen, 1 W. Saun. 295, where the cases are collected.

To make a contract void for usury, there must have been a loan.(a)(1)

Therefore, if an acceptor discounts his own acceptances, at a premium beyond legal interest, that is not usury; for the acceptor does not advance his own money to another, but merely pays a debt to another before it is due. "It is," says Lord Ellenborough, "an improper practice, but not usury."(b)(2)

(a) *Harvey v. Archbold*, 3 B. & C. 626, E. C. L. R. vol. 10; 5 D. & Ry. 500, S. C.

(b) *Barclay v. Walmsley*, 4 East, 55.

(1) A contract to take a loan of money at more than legal interest is usurious, though no illegal interest is actually taken upon it. *Clark v. Badgely*, 3 Halsted, 233.

(2) *Manhattan Co. v. Osgood*, 15 Johns. 162; *King v. Johnson*, 3 M'Cord, 365; *Churchill v. Suter*, 4 Mass. 156; *Bridge v. Hubbard*, 15 Ibid. 96; *Wycoff v. Loughhead*, 2 Dall. 92; *Musgrove v. Gibbs*, 1 Ibid. 216; *Lloyd v. Keach*, 2 Conn. 175; *Powell v. Waters*, 8 Cowen, 669; *Nichols v. Fearson*, 7 Peters, 103; *Cram v. Hendricks*, 7 Wendell, 569; *French v. Grindle*, 3 Shepl. 163; *Freeman v. Brittin*, 2 Harrison, 191; *Mazuran v. Mead*, 21 Wend. 285; *Ballinger v. Edwards*, 4 Iredell's Eq. 449; *Haleman v. Hobson*, 8 Humph. 127.

The purchase of a bill at any price is not usurious; but the purchase must be complete so as to enable the purchaser to bring suit on it. A bill not accepted is not of this character. *M'Lean v. Lafayette Bank*, 3 M'Lean, 587.

Where an indorsee takes a bill or note with the indorsement or guarantee of the indorser, and advances thereupon less than the real value of the bill or note, the transaction is, in effect, a loan between the indorser and indorsee, and usurious. *M'Elwee v. Collins*, 4 Dev. & Batt. 209.

If a note, made for the purpose of raising money, is discounted at a higher premium than the legal rate of interest, and none of the parties whose names are on it can, as between themselves, maintain a suit on the note, when it becomes due, provided it had not been discounted, then such discounting of the note is usurious, for it is then that it first exists as a contract. *Knights v. Putnam*, 3 Pick. 184; *Sauerwien v. Brumer*, 1 Har. & Gill, 477; *Metcalf v. Watkins*, 1 Porter, 57; *Gouch v. Massey*, 4 Humph. 374; *Acby v. Rapelye*, 1 Hill, 9; *Belden v. Lamb*, 17 Conn. 441; *Dowe v. Schutt*, 2 Denio, 621.

It is otherwise, however, if the purchaser is ignorant of the character of the note. *Whitworth v. Adams*, 5 Rand. 333; *Ramsey v. Clark*, 4 Humph. 244; *Creed v. Stevens*, 4 Whart. 223; *Long v. Gantley*, 4 Dev. & Batt. 313; *Hays v. Walker*, 7 Blackford, 540; *May v. Campbell*, 7 Humph. 450.

The taking of interest in advance upon the discount of a note is not usury. *Bank of Utica v. Phillips*, 3 Wendell, 408; *Thornton v. Bank of Washington*, 3 Peters, 40; *State Bank v. Hunter*, 1 Devereux, 100; *M'Gill v. Ware*, 4 Scam. 21; *Parker v. Cousins*, 2 Gratt. 372.

Nor taking interest for both the first and last day. *Crump v. Nicholas*, 5 Leigh, 251; *State Bank v. Cowan*, 8 Leigh, 238.

As to the use of Rowlett's Tables of Interest, which consider three hundred and

But the ordinary transaction of discounting a bill or note is a lending within the statute.(1) The party discounting does, in fact, lend money on interest, to be repaid either by the person receiving, or by some other party to the bill, at a certain fixed period. The general rule of law is, that if the interest be retained at the time of the loan, or be stipulated to be paid *before it falls regularly due, [*246] the contract is usurious.(c) But, in favor of trade, an exception is allowed in the case of discount of bills. The interest is then allowed to be retained at the time of the loan, or, in other words, interest may be and is always charged, not on the sum actually advanced, but on the sum for which the bill is made payable.(2) Thus, if a bill for 100*l.* at twelve months' date is discounted at five per cent., the sum actually paid is 95*l.*, and the 5*l.* discount received is, in fact, interest at the rate of more than 5*l.* 5*s.* 3*d.* on the loan. It is evident that, the longer the date of the bill, the greater the amount of the interest retained, the less the actual advance, and the higher the rate of interest on the advance; so that, if a bill at twenty years' date were discounted at five per cent., the interest would annihilate the principal. This exception is, therefore, restrained to discounts in the ordinary course of trade, where the excess of charge above the legal rate is fairly referable to the trouble and expense to which the merchant or banker discounting is exposed.(d) And the discounting of a bill at a very long date, as, for example, two or three years, seems of itself a suspicious circumstance; and, if it be done as an artifice to obtain more than legal interest, the transaction will be usurious, and the bill and any substituted security will be void, in the hands of the discounter, against all parties.(e)(3)

(c) *Barnes v. Worlich*, Noy, 41; *Cro. Jac.* 25; *Yelv.* 30; *Moore*, 644, S. C.

(d) *Marsh v. Martindale*, 3 *Bos. & Pul.* 154.

(e) *Ibid.*

sixty days as a year, see *State Bank v. Cowan*, 8 *Leigh*, 238; *Planters' Bank v. Snodgrass*, 4 *Howard (Miss.)*, 573; *Parker v. Cousins*, 2 *Grattan*, 372; *Bank of Utica v. Wager*, 8 *Cowen*, 398.

(1) *Contra*; *Young v. Miller*, 7 *B. Monroe*, 540.

(2) The day on which a note is discounted is to be excluded, in the computation of interest; but a day's interest has accrued at any time of the next day. *Bank of Burlington v. Durkee*, 1 *Vermont*, 403.

(3) When the charge of exchange will or will not be usurious. *Andrews v. Pond*, 13 *Peters*, 65; *Merritt v. Benton*, 10 *Wend.* 116; *Cayuga Bank v. Hunt*, 2 *Hill*, 635; *Commercial Bank v. Nolan*, 7 *Howard (Miss.)*, 508; *M'Lean v. Bank*, 3 *M'Lean*, 587; *Holford v. Blatchford*, 2 *Sandf. Ch. Rep.* 149; *Pilcher v. Banks*, 7 *B. Monroe*, 548.

If a bill or note be given on a usurious contract, but for a pre-existing legal debt, the debt is not extinguished, though the security is void.(f)

If the excessive charge be in any case no more than a fair remuneration for trouble and expense, it will not be usury. Thus, where a man took promissory notes to a bank to be discounted, and, on being asked how he would have the money, said, partly in cash, partly in account, and partly in bills on London, some at three, some at seven, and some at thirty days' sight; and the banker accordingly discounted the notes at five *per cent. in that way, deducting dis- [*247]count for the whole time that the notes had to run, but making no allowance for the time which must elapse before the bills on London became payable, though the cash could not be said to be advanced by him till the bills on London fell due, and though in consequence he received more than legal interest for his advances, the transaction was held not to be usurious, for, the mode of payment being suggested by the other party, it could not have been devised by him as a screen for a corrupt loan. And it was held that the interest which he gained on the bills on London, might be considered as a compensation for the trouble and expense of paying the money there; that the discount and remittance were separate transactions.(g) But, where the substituted bill was not given at the particular request of the parties applying for discount, and was itself discounted, Lord Kenyon held the original discount usurious.(h) A merchant, banker, or other person, may, in addition to the discount, take a reasonable and customary sum for remitting the note or bill for payment, and other incidental expenses.(i) So he may take a commission for accepting or drawing bills, whether the bills be payable in the same

(f) *Phillips v. Cockayne*, 3 Camp. 119. A. being about to purchase an estate, B. agreed to lend him money upon it, and before the conveyance from the vendor to A. was completed, on receiving the then title-deeds, advanced the money; afterwards it was agreed between A. and B., that A. should pay usurious interest on the money advanced; and after this agreement, the conveyance from the vendor to A. was by A. handed over to B. A. having become bankrupt, held that his assignees could not in trover recover the latter deed, because by the first agreement, untainted with usury, B. acquired a right to it. *Wood v. Grimwood*, 10 B. & C. 679, E. C. L. R. vol. 21.

(g) *Hammett v. Yea*, 1 B. & P. 144.

(h) *Matthews v. Griffiths, Peake*, 200.

(i) *Winch v. Fenn*, cited in *Auriol v. Thomas*, 2 T. R. 52; **Ex parte Jones*, 17 Ves. 332; *Baynes v. Fry*, 15 Ves. 120; *Masterman v. Cowrie*, 3 Camp. 488.

place or not. *(k)* No precise rate for commission in such cases is fixed by law, but the usual rate, sanctioned by the decisions, is 5s. per cent. Upon a long and complicated account, a banker has been allowed to charge one-half per cent.; but, in another case, where a person in general business, but not a banker, charged 7s. 6d. per cent. for discounting bills, and gave no evidence of having been put to any extraordinary trouble or expense, Lord Ellenborough thought the charge usurious. *(l)* Whether in any case the charge for commission be but a fair remuneration for trouble and expense, or a mere artifice for charging illegal interest, is a question of fact for the jury. *(m)* ⁽¹⁾

To constitute usury, there must, further, be a *corrupt intention*, not, perhaps, to evade the statute, for a man may not know that there is such a law; but his ignorance of the law here, as in all other cases, is no excuse, for it is one which (as Selden observes) every one might make, and nobody could tell how to refute him; but there must be a *corrupt intention to take *exorbitant interest.* ⁽²⁾ Thus the old cases show, that if illegal interest be reserved by mistake, as by an error in the computation of time, it is not usury. *(n)* Accord-

(k) Masterman v. Cowrie, 3 Camp. 488.

(l) Brook v. Middleton, 1 Camp. 445.

(m) Carstairs v. Stein, 4 M. & Sel. 192; Harris v. Boston, 2 Camp. 348; Masterman v. Cowrie, 3 Camp. 488.

(n) Buckley v. Guilbank, Cro. Jac. 677; Nevison v. Whitley, Cro. Car. 501.

⁽¹⁾ A compensation, exceeding the lawful rate of interest for obtaining money at the bank, on one's own security for the use of another, is not usury, unless it is so unreasonable and extravagant as to show that it was a cover for usury, and whether it is so or not is a question for the jury. Hutchinson v. Hosmer, 2 Conn. 341.

As to when the charge of commission will be usurious. See Bartlett v. Williams, 1 Pick. 288; Trotter v. Curtis, 19 Johns. 160; Ramsdell v. Morgan, 16 Wendell, 574; McKesson v. McDowell, 4 Dev. & Batt. 120; Suydam v. Westfall, 4 Hill, 211; Harger v. McCullough, 2 Denio, 119; Dry Dock Co. v. Trust Co., 3 Sandf. Ch. Rep. 215.

The bona fide sale of one's credit or guarantee is not usurious, though it exceed the legal rate of interest, and is not connected with a loan. Ketchum v. Barber, 4 Hill, 224; More v. Howland, 4 Denio, 264.

⁽²⁾ Childers v. Dean, 4 Rand. 406; Maine Bank v. Butts, 9 Mass. 49; Gibson v. Stearns, 3 N. Hamp. 185; Bank of Utica v. Smalley, 2 Cowen, 770; Duvall v. Farmers' Bank, 7 Gill & Johns. 44.

Parting with depreciated paper at par and charging for the same the legal rate of interest, does not constitute usury. U. S. Bank v. Waggener, 9 Peters, 378. See Caton v. Shaw, 2 Har. & Gill, 13; U. S. Bank v. Owen, 2 Peters, 537; Sizer v. Miller, 1 Hill, 227. Contra, Bondurant v. Bank, 8 Smedes & Marshall, 533; Cook v. Bank, Ibid. 543.

ingly, where A. was indebted to the plaintiff in a bond executed in St. Kitts, conditioned for the payment of 6000*l.*, and six per cent. interest, and it was agreed that the principal should be paid in two bills of exchange at long dates, which were drawn in favor of the plaintiff, for the principal and interest which would be due at the time they were payable, the plaintiff's agent computing the interest by mistake still at six per cent., and the bond was then cancelled, Mansfield, C. J., held that the action on the bills might clearly be maintained for the sum bona fide due; as the excess in the amount of the bill had arisen from a mere mistake, and no intention to take usury could at any rate be imputed to the plaintiff himself.(o) A. was indebted to B. in 80*l.*, and gave him a promissory note for 87*l.* 3*s.*, payable by four quarterly instalments (being the amount of the principal and legal interest), with a clause, that, in case default should be made in payment of any one instalment, the whole sum should become payable. The Court held that this was not a stipulation for usury, but for a penalty, and that A. was entitled to recover the whole sum on default.(p) Where a broker was employed to get a bill discounted, which he did upon an agreement to reserve to himself 10*s.* per cent. commission, as the party advancing the money was no party to this agreement, and had no intention that more than legal interest should be charged, it was held that the discount was not usurious.(q)

The contract must be for repayment of the principal, at all events: for, if the principal be put in hazard, it is not usury. "If I lend 100*l.* to have 120*l.* at the year's end upon a casualty, if the casualty goes to the interest only, and not to the principal, it is usury; for the party is sure to have the principal again, come what will come; but if the interest and principal are both in hazard, it is not then usury."(r) Hence, the purchase of an annuity with a clause for redemption by the grantor, though on terms never so exorbitant, is not usury. And where the lender becomes a partner with the borrower by deed in the borrower's trade, and is to receive profits thereout, in addition to the interest, to a certain amount, at all events, *this may be a contract of partnership, and not a usurious loan.(s) But if

(o) *Glasfurd v. Laing*, 1 Camp. 149.

(p) *Wells v. Girling*, 4 Moore, 78; 1 B. & B. 447, E. C. L. R. vol. 5; Gow. R. 21, S. C.

(q) *Dagnall v. Wigley*, 11 East, 43.

(r) *Roberts v. Trenayne*, Cro. Jac. 507; *Chesterfield v. Jansen*, 1 Wils. 286.

(s) *Gilpin v. Enderbey*, 5 B. & Al. 954, E. C. L. R. vol. 7; 1 D. & Ry. 570, S. C.

the lender do not profess to be a partner, and is, nevertheless, to receive a portion of the profits in addition to the interest, it is a usurious loan, for, though the lender thereby so far puts his principal in hazard as to render it liable to partnership creditors, yet it is no further hazarded than in the case of every other loan, namely, by the risk of the borrower's insolvency.(t)

Usury may be committed within the express words of the statute, not only by advancing money, but by advancing *goods*, to be repaid in money. If goods are forced upon the borrower in lieu of money, as, for example, upon the party applying for the discount of a bill, the transaction is suspicious, and it lies on the lender to show not only that the goods were fairly worth the sum at which they were estimated, but that they would have been easily available in the borrower's hands for raising that sum by resale.(u) But, where the lender requests or prefers to take goods, it lies on him to show that they were estimated above their real value.(v)(1)

In Ireland, in many of the British colonies, and in various foreign states, more than five per cent. interest is allowed by the law of the place. Whenever the contract is made abroad it is not usurious here, because the utmost interest which the law of the place allows is reserved. But it often happens that the transaction is partly in one country, and partly in another, so that whether it is to be considered as a domestic or a foreign contract, becomes a question of great nicety. A. resides in England, B. at Gibraltar, where the legal rate of interest is six per cent., and where a bill on England at ninety days is reckoned as cash. It was agreed that A. should consign to B. goods for sale, and that, upon the receipt of the invoice, B. should remit to A. bills on London at ninety days' date, and charge interest at six per cent. from the date of the bills. Lord Tenterden,—“The case must be considered as if the bargain for the advances had been made at Gibraltar and not in London.”(w)

(t) *Morse v. Wilson*, 4 T. R. 353.

(u) *Davis v. Hardacre*, 2 Camp. 375.

(v) *Coombe v. Miles*, 2 Camp. 553.

(w) *Harvey v. Archbold*, 3 B. & C. 626, E. C. L. R. vol. 10 ; 5 D. & R. 500, S. C.

(1) A contract to lend a portion of the money wanted by the borrower, on condition that he will receive stock at a price much above the market value, to make up the deficiency, is usurious. *Stribbling v. Bank*, 5 Rand. 132 ; *Valley Bank v. Stribbling*, 7 Leigh, 26 ; *Bank v. Arthur*, 3 Grattan, 173 ; *Archer v. Putnam*, 12 Smedes & Marshall, 286.

The statute 14 Geo. 3, c. 79, and 1 & 2 Geo. 4, c. 51, the latter repealed, and re-enacted by 3 Geo. 4, c. 47, reciting that doubts had arisen on the point, enact, that all mortgages or securities of or concerning any lands, tenements, *hereditaments, slaves, cattle, [*250] or other things, in Ireland, or the West India colonies, where-by interest is reserved above the rate of five per cent., but not exceeding the rate allowed by the law of that place, are valid, *though executed in Great Britain*, as well as all bonds and covenants, original or collateral, for further securing money so advanced. It will be observed, that these statutes do not include bills and notes, and, therefore, it is a doubtful point, whether a bill or note not exempted from the Usury Laws by the recent statutes, and given in England as a collateral security for an Irish, colonial, or foreign debt, with more than five per cent. interest, be legal.(x) It seems clear, however, that if the original security be cancelled, and a bill or note be taken as a substituted security, but carrying the original interest, such a bill or note is usurious.(y)

If a usurious bill or note be in the hands of a holder who was either a party to or cognizant of the usurious transaction, and he give it up for a substituted security, as a note, or even if he deliver up this note for a further security, as a bond, the original usurious taint infects both the subsequent securities, and either is void.(z) But, if the party taking a substituted security had no notice of the usury, the security is good.(a) Yet, before 58 Geo. 3, c. 93, if a party had taken a usurious bill without notice of the usury, and, afterwards, upon learning the defect, took a substituted bill, such second bill was void.(b) But, if the substituted security be for principal and legal interest only, expunging the bad part of the debt, it is good.(c) And where a bill or note is given on a consideration, partly usurious and partly legal, the holder cannot recover even for the good part, though the whole amount of the bill should not be sufficient to cover that.(d)

(x) See *Lord Ranelagh v. Champante*, 2 Vern. 395; 1 Eq. Ca. Ab. 289.

(y) *Glassfurd v. Laing*, 1 Camp. 149; *Dewar v. Span*, 3 T. R. 426.

(z) *Marsh v. Martindale*, 3 B. & P. 154.

(a) *Cuthbert v. Haley*, 8 T. R. 390; 3 Esp. 22, S. C.

(b) *Chapman v. Black*, 2 B. & Ald. 588; *Amory v. Meryweather*, 2 B. & C. 573; E. C. L. R. vol. 9; 4 D. & R. 86, S. C.

(c) *Preston v. Jackson*, 2 Stark. 237, E. C. L. R. vol. 3; *Barnes v. Hedley*, 1 Camp. 157-180, d.; 2 Taunt. 184, S. C.

(d) *Harrison v. Hannel*, 5 Taunt. 780, E. C. L. R. vol. 1; 1 Marsh. 349, S. C.

It makes no difference that the contract is comprised in two separate instruments.(e)

Before the late statute, if the bill were tainted with usury [*251] *in its inception, or if it was necessary for the holder to make title through any party guilty of usury,(f) he could not recover, though he had no notice of the usury. But now by the 58 Geo. 3, c. 93, no bill or note, though given for a usurious consideration, or upon a usurious contract, shall be void in the hands of an indorsee for value, unless he had notice at the time of taking the bill that it had been given for a usurious consideration.(g)

Such was the law of usury in its application to all bills and notes before the recent statutes, and such is still the law as to all bills and notes made for a longer period than twelve months, and under the amount of ten pounds.

The 3 & 4 Wm. 4, c. 98, s. 7, which act is still in force, exempts from the operation of the Usury Laws, bills and notes not having more than *three* months to run. Query, whether a bill or note good within this act, be invalidated by being part of a real security?(h)

On this statute it has been decided that a warrant of attorney given to secure a bill, which, but for the act, would have been usurious, is within the protection of the statute.(i) The act applies to a note payable to A. or order *on demand*, and given for money lent on an agreement to pay 5*l.* over and above all lawful interest for the loan during such time as A. should forbear, and give day of payment for the same.(k)

The 1 Vict. c. 80, a temporary act, exempted from the operation

(e) *Roberts v. Trenayne*, Cro. Jac. 507; *White v. Wright*, 3 B. & C. 273, E. C. L. R. vol. 10; 5 D. & R. 10, S. C.

(f) *Lowes v. Mazzaredo*, 1 Stark. 385, E. C. L. R. vol. 2.

(g) This statute does not apply to a note in the hands of a party who has taken it in payment of an antecedent debt; see also 5 & 6 Wm. 4, c. 41; *Vallance v. Siddel*, 6 Ad. & Ell. 932, E. C. L. R. vol. 33; 2 N. & P. 78, S. C. In an action brought before the passing of this act, but tried after, the defendant may avail himself of 9 Anne, c. 14, and is entitled to nonsuit if he prove the bill to be given for a gaming consideration. *Hitchcock v. Way*, 6 Ad. & Ell. 943, E. C. L. R. vol. 33; 2 Nev. & P. 72, S. C.

(h) *Follett v. Moore*, 19 L. J. 7 Exch.; 4 Exch. 410,* S. C.

(i) *Connop v. Meaks*, 4 Nev. & Man. 302; 2 Ad. & E. 326, E. C. L. R. vol. 29, S. C. Vide *supra*.

(k) *Vallance v. Siddel*, *supra*, note (g).

of the Usury Laws, bills and notes not having more than twelve months to run.

The 2 & 3 Vict. c. 37, exempts from the operation of the Usury Laws bills and notes, not having more than twelve months to run, and *all contracts*(*l*) for the loan of money above the sum of ten pounds, providing that the act shall not extend to loans on landed security.(*m*) But a loan of money *on security of a lease, a warrant of attorney and a promissory note, is not protected.(*n*) [**252*]

The question is, on what security was the money lent? If on a mortgage, and the bill were taken afterwards, there is no valid loan; if on a bill, and the mortgage was taken afterwards, there is a good debt.(*o*) Where a party borrowed a sum of 6700*l.* on the security of a mortgage and a promissory note, which was discounted by the lender at five per cent. so that the interest to be paid was more than five per cent. on the sum actually advanced, the mortgage was held valid; the jury finding that the primary object of the parties was the discounting of the note.(*p*) The discount of bills is not illegal, though the amount be secured by warrant of attorney, which may become a charge on land.(*q*)

The statute 2 & 3 Vict. c. 37, is not disabling or retrospective, and therefore if a real security be given for the amount of bills discounted at more than five per cent. before the statute, under the 1 Vict. c. 80, the real security is not tainted with usury.(*r*)

In a declaration or plea, grounded on the statute of 12 Anne, stat.

(*l*) *Thibault v. Gibson*, 12 M. & W. 88.*

(*m*) So that now, persons who have security to offer, and require no protection, are protected; but those who have no security to offer, and, therefore, most need protection, are unprotected.

(*n*) *Berrington v. Collis*, 5 Bing. N. C. 332, E. C. L. R. vol. 35; 7 Scott, 302, S. C. As to renewals, and agreements to give bills at a future time, see *Holt v. Miers*, 5 M. & W. 168; * *King v. Braddon*, 10 Ad. & E. 675, E. C. L. R. vol. 37; 2 Per. & D. 546, S. C.

(*o*) *Downes v. Garbutt*, 12 L. J. 269, Q. B.; and see *Hodgkinson v. Wyatt*, 4 Q. B. Rep. 749, E. C. L. R. vol. 45; *Follett v. Moore*, 19 L. J. 6, Exch.; 4 Exch. Rep. 410,* S. C.

(*p*) This transaction was before the statute 2 & 3 Vict. c. 37; *Doe v. King*, 12 L. J. 320, Exch.; 11 M. & W. 333,* S. C. Quære, whether an advance on the deposit of a policy of insurance, though the insurance company have real securities, and though the assured be a member of the company, is a loan secured by an interest in land. *March v. The Attorney-General*, 5 Beavan, 433.

(*q*) *Lane v. Horlock*, 16 L. J. 87, Q. B.

(*r*) *Bell v. Coleman*, 15 L. J. 2 C. P.; 2 C. B. 268, E. C. L. R. vol. 52, S. C.

2, c. 16, it is not necessary to negative the exception introduced by the 2 & 3 Vict. c. 37. The exception must come from the other side.(s)

And in stating that exception it lies on the party introducing it to aver not only that the contract was after the passing of the statute of Victoria, but that it did not relate to land.(t)

This act is extended by the 4 & 5 Vict. c. 54, to the 1st January, 1844; by 6 & 7 Vict. c. 45, to the 1st January, 1846; by the 8 & 9 Vict. c. 102, to the 1st January, 1851, and by 13 & 14 Vict. c. 56, to 1st January, 1856.

[*253]

*CHAPTER XXIV.

OF THE ALTERATION OF A BILL OR NOTE.

EFFECT OF ALTERATION AT COMMON		WHEN THE ALTERATION OF THE INSTRUMENT EXTINGUISHES THE DEBT,	
LAW,	253	RENEWAL OF ALTERED BILL, . . .	257
OF DEEDS,	253	WHEN ALTERATION NEED NOT BE	
OF BILLS AND NOTES,	254	PLEADED,	257
UNDER THE STAMP ACTS,	255	WHEN IT MUST BE PLEADED, . . .	258
WHERE AN ALTERATION WILL NOT		REQUISITES OF PLEA,	258
VITIATE,	255	BURDEN OF PROOF,	258
BEFORE BILL ISSUED,	255		
IN CORRECTION OF A MISTAKE,	256		

IN treating of the alteration of a negotiable instrument, we will consider the effect of alteration; first, at common law, and, secondly, under the Stamp Act.

First, at common law. If a deed, well and sufficiently made in its creation, shall be afterwards altered by rasure, interlining, addition, drawing a line through the words, though they be still legible, or by writing new letters upon the old in any material place or part of it, either by the party that hath the deed, or any other whomsoever, unless the alteration be by him who is bound by the deed (for he shall not take advantage of his own wrong), or by his consent, the deed has lost its force and is become void.(a)

(s) *Thibault v. Gibson*, 12 M. & W. 88.*

(t) *Washbourne v. Burrows*, 16 L. J. 266, Exch.; 1 Exch.; 107,* S. C.

(a) *Shepherd's Touchstone*, 68. And a deed is not it seems vacated, at common law, if the alteration, though material, were with the consent of all the parties. *Markham v. Gonaston*, Cro. El. 627; *Zouch v. Clay*, 2 Lev. 35; Com. Dig. Fait. F. I.

And by a recent solemn decision, a deed, bill of exchange, promissory note, guarantee, or any other executory written contract, is avoided by an alteration in a material part, although that alteration be made by a stranger.(b)(1) For a person, who has the custody of an instrument, is bound to preserve it in its integrity. And as it would be avoided by *his fraud in altering it himself, so it shall be avoided by his *laches* in suffering another to alter it. [*254]

The rules relating to alteration or rasure of deeds apply (at least for the most part) to other written contracts, and to bills and notes. Thus, where a bill was drawn payable to A. B., and whilst in his possession the date was altered, and the bill was subsequently indorsed to the plaintiffs for value, it was held that they could not recover against the acceptor.(2) "It seems admitted," says Ashurst,

(b) Davidson v. Cooper, 11 M. & W. 778,* affirmed in error, 13 M. & W. 343.*

(1) An alteration by a stranger, though material, will*not render the instrument inoperative. Nicholls v. Johnson, 10 Conn. 192; Medlin v. Platte County, 8 Missouri, 235; Davis v. Carlisle, 5 Alabama, 707; Ford v. Ford, 17 Pick. 418; Waring v. Smyth, 2 Barb. Ch. Rep. 119; Lee v. Alexander, 9 B. Monroe, 25.

(2) An alteration by the payee or holder of a bill or note in any material respect avoids the instrument as to the maker, and all parties except the person making the alteration even in the hands of an innocent indorsee for value. Stephens v. Graham, 7 Serg. & Rawle, 508; Cloud v. Stout, 5 Litt. 205; Pankey v. Mitchell, 1 Breeze, 301; Mitchell v. Ringgold, 3 Har. & Johns. 159.

Though by the alteration the day of payment is protracted, the note is nevertheless void. United States Bank v. Russell, 3 Yeates, 391; Miller v. Gilleland, 19 Penna. State Rep. 119.

If the note was dated wrong by mistake, yet an alteration without the maker's consent express or implied, renders it void. Bowers v. Jewell, 2 New Hamp. 543. See Hocker v. Jamison, 2 Watts & Serg. 438; Henderson v. Wilson, 6 How. Miss. Rep. 65.

Writing in the margin "payable at the Bank of America," held to be a material alteration. Woodworth v. Bank of America, 19 Johns. 391; Simpson v. Stackhouse, 9 Barr, 186.

An accommodation bill was drawn for the purpose of being discounted at a bank, and at the foot of it was a memorandum, signed by the last indorser, directing the proceeds of the bill to be credited to the drawer. On the trial of a suit on the bill by the last against a prior indorser, it appeared that this memorandum had been cut off. It was held that the memorandum was no part of the bill, and that its being taken off in no way affected the rights of the parties to the bill. Hubbard v. Williamson, 25 Iredell, 397.

If blank spaces be left to be filled after execution, the consent of the party executing that they shall be afterwards filled is to be implied. Wiley v. Moon, 17 Serg. & Rawle, 438; Smith v. Crooker, 5 Mass. 538; Jordan v. Neilson, 2 Wash. 164;

J., "that if this had been a deed the alteration would have vitiated it. Now, I cannot see any reason why the principle on which a deed would have been avoided, should not extend to a case of a bill of exchange. There is no magic in parchment or wax, and the principle to be extracted from the cases is, that any alteration avoids the contract. If A. B. had brought this action, he could not have recovered, because he must suffer from any alteration of the bill whilst in his custody; the same objection must hold against the plaintiffs, who derive title from him." (c) So, where the drawer, without the consent of the acceptor, added to the acceptance the words, "Payable at Mr. B.'s, Chiswell Street," it was held that this was a material alteration discharging the acceptor. (d) And the same point has been decided since the 1 & 2 Geo. 4, c. 78. "Suppose," says Abbott, C. J., "a bill so altered to be indorsed to a person ignorant of the alteration: his right to sue his indorser would, as the bill appears, be complete, upon default made where the bill is payable; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such non-payment. I am of opinion, therefore, that the alteration is in a material part of the bill, and the ac-

(c) *Master v. Miller*, 4 T. R. 320; in error, 2 H. Bl. 140, S. C.

(d) *Cowie v. Halsall*, 4 B. & Ald. 197, E. C. L. R. vol. 6; 3 Stark. 36, S. C.

Boardman v. Gore, 1 Stewart, 517; *Bank v. Curry*, 2 Dana, 142; *Stahl v. Berger*, 10 Serg. & Rawle, 170; *Commonwealth Bank v. McChord*, 4 Dana, 191; *Douglass v. Scott*, 8 Leigh, 43; *Richmond Manufacturing Co. v. Davis*, 7 Blackford, 412.

An alteration which does not vary the meaning of an instrument does not avoid it, though made by the party claiming under it. *Nicholls v. Johnson*, 10 Conn. 192; *Granite Railway Co. v. Bacon*, 15 Pick. 239; *Morrill v. Otis*, 12 N. Hamp. 466; *Pequawket Bridge v. Mathes*, 6 N. Hamp. 139; *Mathis v. Mathis*, 6 Dev. & Batt. 60; *Harris v. Bradford*, 4 Alabama, 214; *Gardner v. Sisk*, 3 Barr, 326.

A promissory note was made payable to a partnership under one name, and indorsed by a surety, and was afterwards altered by the maker and payee, without the knowledge of the surety, so as to be payable to the same partnership by a different name; held, in an action by the payee against the surety, that the alteration was immaterial, and did not affect the validity of the note. *Arnold v. Jones*, 2 Rhode Island, 345.

When a person not present at the execution of a promissory note afterwards puts his name thereto as a witness by the procurement of the payee, it avoids the note. *Homer v. Wallis*, 11 Mass. 309. Aliter where a person present at the execution, afterwards affixes his name as a witness without any fraudulent intent. *Smith v. Dunham*, 8 Pick. 249; see *Marshall v. Gougler*, 10 Serg. & Rawle, 164; *Raviesies v. Alston*, 5 Alabama, 297; *Steward v. Preston*, 1 Branch, 10; *Blackwell v. Lane*, 4 Dev. & Batt. 113; *Adams v. Frye*, 3 Metcalf, 103; *Henning v. Werkheiser*, 8 Barr, 518; *Thornton v. Appleton*, 29 Maine, 298; *State v. Gherkin*, 7 Iredell, 206.

ceptor is, in consequence, discharged.”(e) But it has been held by the same learned Judge,(f) and by the Court of Exchequer, that a similar addition, with the consent of the acceptor, would not invalidate the instrument, either at common law or under the Stamp Act. Where a bill was addressed *to A. B. and Co., and the acceptance was by A. and B., and the address was afterwards [*255] altered to correspond with the acceptance, as they would be liable either way, the alteration was held immaterial.(g)

But, secondly, even if the consent of all parties have been obtained to an alteration in a material part, such alteration, nevertheless, avoids the bill, under the Stamp Laws; for it is become a new and different instrument, and therefore requires a new stamp; which stamp cannot, as we have seen, then be affixed.(h) Any alteration in the date, sum,(i) or time of payment, the insertion of words rendering negotiable an instrument which before was not so, altering the words, “*value received*,” into an expression of the particular consideration which passed, are respectively material alterations, avoiding the bill under the Stamp Acts.(k)

There are, however, two cases(l) in which an alteration, though in a material part, will not vacate the instrument; first, where such an alteration is made before the bill is issued, or become an available instrument; and, secondly, where it is altered to correct a mistake, and in furtherance of the original intention of the parties.

(e) *M’Intosh v. Haydon*, R. & M. 362; *Desbrowe v. Weatherby*, 1 M. & Rob. 438; 6 C. & P. 758, E. C. L. R. vol. 25, S. C.; *Taylor v. Mosely*, 1 M. & Rob. 439, n.; *Semple v. Cole*, 8 L. J. Exch. 155.

(f) *Stevens v. Lloyd*, M. & M. 292; and see *Jacob v. Hart*, 6 M. & Sel. 142; *Walter v. Cubley*, 2 C. & Mees. 151; * but in *Walter v. Cubley*, the attention of the Court was not drawn to *Gibb v. Mather*, 8 Bing. 221, E. C. L. R. vol. 21; 1 Moore & S. 387; 2 C. & J. 254,* S. C. Would not the alteration have been material in an action against the drawer? *Stevens v. Lloyd*, M. & M. 292; and if so, was not the legal effect of the instrument altered?

(g) *Farquhar v. Southey*, M. & M. 17; 2 C. & P. 497, E. C. L. R. vol. 12, S. C.; *Hamelin v. Bruck*, 15 L. J. Q. B. 343; 9 Q. B. 306, E. C. L. R. vol. 58, S. C.

(h) *Wilson v. Justice*, Bay, 6th ed. 118; *Bowman v. Nichol*, 5 T. R. 537; 1 Esp. 81, S. C.

(i) *Hamelin v. Bruck*, 15 L. J., Q. B. 343; 9 Q. B. 306, E. C. L. R. vol. 58, S. C.

(k) *Bathe v. Taylor*, 15 East, 412; *Walton v. Hastings*, 4 Camp. 223; 1 Stark. 215, S. C.; *Outwaite v. Luntley*, 4 Camp. 179; *Knill v. Williams*, 10 East, 431.

(l) See *Catton v. Simpson*, 8 Ad. & E. 136, E. C. L. R. vol. 35.

Thus, where the drawer of a bill, payable to his own order, sent it to the drawee for acceptance, and the drawee requested that a longer time might be allowed for payment, and an alteration to that effect was accordingly made with the consent of the drawer, and the bill afterwards accepted; it was held that, the alteration being made before the bill was an available instrument against any party, a new stamp was unnecessary.^(m) Upon the same principle, where three persons joined, as drawer, acceptor, and indorser, in the fabrication of an accommodation bill, and the date was altered before it came into the hands of a holder for value; it was held that, as the accommodation parties could not sue upon it inter se, it was not, till it came into the hands of a holder for value, an available instrument, and therefore that an alteration before that time did not vitiate it. [*256] “The question,” says Abbott, C. J., “is, whether this *alteration made it a new bill? Now, undoubtedly, when an accommodation bill has the names of the different parties written upon it, it is, in some sense of the word, a bill of exchange; but it is utterly unavailable as a security for money, until it is issued to some real holder for a valuable consideration. It first became a bill of exchange when it was issued to the indorsee for a valuable consideration.” “Here,” adds Best, J., “at the time when the alteration was made, the bill was a perfect bill in form, but it did not constitute a valid contract between the parties. A bond is a perfect instrument before delivery; but still an alteration made before delivery will not vitiate it.”⁽ⁿ⁾ But, if either payee or indorsee have given value for it, so that the drawer is liable, an alteration, though before acceptance, vacates the bill. “In such a case,” says Lord Ellenborough, “it does not remain in fieri till acceptance. As to the drawer, it was before then a perfect instrument.”^(o) When the date was altered, a new bill was drawn, and that could not be done without a new stamp.”^(p) So, if a promissory note be signed by A., and subsequently by B., as surety for A., whilst the note is in the hands of the payee it will be void, unless the signature of B. is in pursuance of a previous agreement at

(m) Kennerly v. Nash, 1 Stark. 452, E. C. L. R. vol. 2.

(n) Downes v. Richardson, 5 B. & Ald. 674, E. C. L. R. vol. 7; 1 D. & R. 332, S. C.; Tarleton v. Shingler, 7 C. B. Rep. 812, E. C. L. R. vol. 62. As to the alteration of a deed after execution by one party, see Jones v. Jones, 1 C. & M. 721; * before complete delivery, Spicer v. Burgess, 1 C. M. & R. 129; * 4 Tyr. 598, S. C.

(o) Walton v. Hastings, 4 Camp. 223; 1 Stark. 215, E. C. L. R. vol. 2, S. C.

(p) Outhwaite v. Luntley, 4 Camp. 179.

the time of making the note.(q) And an altered bill will be void in the hands of an innocent indorsee, as well as in the hands of parties cognizant of the alteration.(r)

If, again, the alteration were merely to correct a mistake, and to make a bill what it was originally intended to be, it will not avoid it under the Stamp Act. Thus, where the drawer intended to make the bill negotiable, and indorsed it over, but had omitted the words "*or order*," their subsequent insertion in pursuance of the original intention, was held not to vacate the bill.(s) So, where a bill, having been dated, by mistake, 1822, instead of 1823, the agent of the drawer and acceptor, to whom it had been given to be delivered to the indorsee, without their knowledge or consent, corrected the mistake; it was held, *that such alteration did not vacate the bill.(t) [*257] A bona fide holder of a bill of exchange, accepted payable to _____, or order, may insert his own name as payee, and indorse it, and the bill may be declared on as payable to the party who has inserted his name. "One," says Best, C. J., "who accepts a bill in this form, undertakes to be answerable for it in the shape of a bill. That being so, he undertakes to be answerable for it in the form which a bona fide holder has a right to give it, and the description in the declaration is made out against him. No new stamp is necessary; the first stamp gives authority for the insertion."(u) Whether the intent of the alteration were to vary the original contract, or merely to correct a mistake, is a question of fact for the jury.(v)

An alteration by the drawer and payee of the bill, or the payee of a note, though it avoids the instrument, does not extinguish the debt;(w) but an alteration by an indorsee not only avoids the security

(q) *Clerk v. Blackstock*, Holt, N. P. C. 474. See *Ex parte White*, 2 Deac. & Chitt. 334.

(r) *Outhwaite v. Luntley*, 4 Camp. 179.

(s) *Kershaw v. Cox*, 3 Esp. 246; 10 East, 437; *Jacobs v. Hart*, 2 Stark. 45, E. C. L. R. vol. 3; 6 M. & Sel. 142, S. C.; *Byron v. Thompson*, 11 Ad. & Ell. 31, E. C. L. R. vol. 39; 3 P. & D. 71, S. C.

(t) *Brutt v. Picard*, R. & M. 37.

(u) *Atwood v. Griffin*, R. & M. 425; 2 C. & P. 368, E. C. L. R. vol. 12, S. C.

(v) *Ibid.*

(w) *Sutton v. Toomer*, 7 B. & C. 416, E. C. L. R. vol. 14; 1 M. & R. 125, S. C.; *Atkinson v. Hawden*, 2 Ad. & Ellis, 628, E. C. L. R. vol. 29; 4 N. & M. 409; 1 H. & W. 77, S. C.; see *Sloman v. Cox*, 1 C. M. & R. 471; * 5 Tyr. 174, S. C. Unless the bill or note were taken in satisfaction of the debt. *McDowall v. Boyd*, 17 L. J. 295, Q. B.

as against all parties, but also extinguishes the debt due to the indorsee from the indorser.(x) For it would be unjust that the indorsee should compel the indorser to pay his debt, when the indorsee has destroyed the instrument on which alone, in some cases, and on which preferably in all cases, the indorser should sue. To make the indorser liable on the consideration and give him a cross action against the indorsee for the alteration, would be to oblige him to rely on the indorsee instead of the antecedent parties, and to prove a fact of which he might have no evidence; it would besides introduce a needless circuitry of action.(1)

If a bill be altered so that a man otherwise liable on it be discharged, he is not liable on a bill given in renewal of the altered bill, unless he were actually apprised of the alteration at the time he gave the substituted bill.(y)

It is conceived, notwithstanding some recent cases, that the alteration of a bill or note need not, when the plaintiff declares *on [258] the instrument *in its altered state*, be specially pleaded. When altered, it is no longer the same instrument that the defendant signed, and, moreover, there is no stamp applicable to the altered instrument, so that it cannot be looked at by the jury to prove the new contract. Therefore it is conceived, that the defendant may, under the plea that he did not make, accept, or indorse the instrument set forth in the declaration, show the alteration, and thereby prove that he executed another instrument, and not that in question,(z) or, if there be no fresh stamp, that there is no instrument which the jury can look at.

But where the declaration is on the instrument, in its original condition, the alteration must be specially pleaded.(a)

(x) *Alderson v. Langdale*, 3 B. & Ad. 660, E. C. L. R. vol. 23.

(y) Means of knowledge are not equivalent to actual knowledge. *Bell v. Gardiner*, 11 L. J. 195, C. P.; 4 M. & G. 11, E. C. L. R. vol. 43.

(z) *Cock v. Coxwell*, 2 C. M. & R. 291; * 4 Dowl. 187; 1 Gale, 177, S. C.; *Calvert v. Baker*, 4 M. & W. 417; * 7 Dowl. 17, S. C.; *Langton v. Lazarus*, 5 M. & W. 629; * *Knight v. Clements*, 8 Ad. & E. 215, E. C. L. R. vol. 35; *Field v. Woods*, 7 Ad. & E. 114, E. C. L. R. vol. 34; *Crotty v. Hodges*, 4 M. & G. 563, E. C. L. R. vol. 43, and *Clifford v. Parker*, 2 M. & G. 909, E. C. L. R. vol. 40.

(a) *Hemming v. Trenery*, 9 Ad. & E. 226, E. C. L. R. vol. 36; 1 Per. & Dav. 661, S. C.; *Bridgman v. Sheehan*, Cor. Parke, B., at Nisi Prius, T. T. 1842; *Mason*

(1) Where an agreement is reduced to writing, whether under seal or not, so as to merge the original promise, and the written agreement is so altered as to avoid it, the party cannot resort to the original contract. *Newell v. Mayberry*, 3 Leigh, 250; *Wheelock v. Freeman*, 13 Pick. 165; *Mills v. Starr*, 2 Bailey, 359.

The plea, where it merely relies on the absence of a proper stamp on the altered instrument, must show that the bill or note could not be made good by being stamped before the trial.(b)

Where an alteration appears on the face of the bill, it lies on the plaintiff to show that it was made under such circumstances as not to vitiate the instrument.(c) And this rule is most reasonable; for, if it lay on the defendant, on an acceptor, for example, sued by an indorsee, to show that the alteration was improperly made, it might be a great hardship; for he may have no means of proving that the bill went unaltered from his *hands, or of showing the circumstances of a subsequent alteration. But the burden of ex-[*259]plaining an alteration imposes no hardship on the plaintiff, for if the bill was altered while in his hands, he may, and ought to account for it; if before, then he took it with a mark of suspicion on its face, which ought to have induced him either to refuse it, or to require evidence of the circumstances under which the alteration was made.(1)

v. Bradley, 12 L. J. 425, Exch.; 11 M. & W. 590,* S. C. But this distinction does not appear to have been recognized in some of the cases. See *Parry v. Nicholson*, 13 M. & W. 778.*

(b) *Bardley v. Bardsley*, 15 L. J. 115, Exch.; 3 D. & L. 476; 14 M. & W. 873,* S. C.

(c) *Johnson v. Duke of Marlborough*, 2 Stark. 313, E. C. L. R. vol. 3; *Henman v. Dickinson*, 5 Bing. 183, E. C. L. R. vol. 15; 2 M. & P. 289, S. C.; *Knight v. Clements*, 3 N. & P. 375, E. C. L. R. vol. 28; 8 Ad. & E. 215, S. C.; *Bishop v. Chambre*, M. & M. 116; 3 C. & P. 55, E. C. L. R. vol. 14; S. C. In *Sibley v. Fisher*, 7 Ad. & Ell. 444, E. C. L. R. vol. 34; 2 N. & P. 430, S. C., the making of the bill as described in the declaration was admitted on the record. See *Earl of Falmouth v. Roberts*, 9 M. & W. 471;* *Desbrow v. Weatherley*, 6 C. & P. 758, E. C. L. R. vol. 25; *Semple v. Cole*, 8 L. J. 155, Exch.; 3 Jurist, 268, S. C. And whether the alteration were before or after the completion of the bill, has been left as a question of fact to the jury. *Taylor v. Mosely*, 6 C. & P. 273, E. C. L. R. vol. 25; and see *Leykrieff v. Ashford*, 12 Moore, 281.

(1) The American cases on this subject are not harmonious. The weight of authority, however, sustains the position in the text. There are several cases which leave the question as a presumption of fact to be determined by the jury. In some instances it has been held that the law presumes an erasure or interlineation to have been made before the instrument was signed. In other cases, however, it has been decided that if an erasure or interlineation appears on the face of the negotiable instrument, some explanation must be given in evidence before it can be allowed to go to the jury. It is then a question of fact for the jury when, by whom, and by whose consent, it was altered; but the materiality of the alteration is in all cases a pure question of law for the Court. See *Jackson v. Osbourne*, 2 Wendell, 555; *Cumberland Bank v. Hall*, 1 Halsted, 215; *Bailey v. Taylor*, 11 Conn. 531; *Heffel-*

finger v. Shute, 16 Serg. & Rawle, 44; Chesley v. Frost, 1 N. Hamp. 145; Jackson v. Jacoby, 9 Cowen, 125; Prevost v. Gratz, Peters, C. C. 369; Stephens v. Graham, 7 Serg. & Rawle, 508; Bowers v. Jewell, 2 N. Hamp. 543; Steele v. Spencer, 1 Peters, 552; Rankin v. Blackwell, 2 Johns. Cas. 198; Hills v. Barnes, 11 N. Hamp. 395; Gooch v. Bryant, 1 Shepl. 386; Crabtree v. Clark, 7 Shepl. 337; Davis v. Carlisle, 6 Alabama, 707; Warren v. Layton, 3 Harrington, 404; Bank v. Lum, 7 Howard, Miss. 414; Wilson v. Henderson, 9 Smedes and Marshall, 375; Matthews v. Coalter, 9 Missouri, 705; Beaman v. Russel, 20 Vermont, 205; Tillou v. Clinton and Essex Ins. Co., 7 Barbour, S. C. 564; Paine v. Esdell, 19 Penna. State Rep. 178; Clark v. Eckstein, 22 Penna. State Rep. 507.

The question of the burden of proof in such cases arose in the Supreme Court of Pennsylvania in *Simpson v. Stackhouse*, 9 Barr, 186. And it was held that the onus of showing that an alteration in a material part of a negotiable instrument was lawfully made is on the holder; and that where the place of payment is in a different handwriting from the body of the instrument there is a presumption of alteration. Chief Justice Gibson, after stating that as a general rule the law presumes in favor of innocence, that an alteration in an instrument is a legitimate part of it, till the contrary appears, but that it is not according to the English cases extended to negotiable instruments, remarks that the decisions in the United States are discrepant, but their preponderance is in favor of restraining the general rule to deeds and writings not negotiable. He then observes: "But how stands the question on principle? The English decisions are founded in reason and not in considerations growing out of the stamp acts. He who takes a blemished bill or note takes it with its imperfections on its head. He becomes sponsor for them, and though he may act honestly, he acts negligently. But the law presumes against negligence as a degree of culpability; and it presumes that he had not only satisfied himself on the innocence of the transaction, but that he had provided himself with the proof of it to meet a scrutiny he had reason to expect. It is of no little weight, too, that the altered instrument is found in his hands, and that no person else can be called on to speak of it; for without a presumption to sustain him, the maker would in every case be defenceless. It may be said that the holder, with such a presumption against him, would also be defenceless. But it was his fault to take such a note. As bills and notes are intended for circulation, and as payees do not usually receive them when clogged with impediments to their circulation, there is a presumption that such an instrument starts fair and untarnished, which stands till it is repelled; and a holder ought therefore to explain why he took it branded with marks of suspicion, which would probably render it unfit for his purposes. The very fact that he received it is presumptive evidence that it was unaltered at the time; and to say the least his folly or his knavery raised a suspicion which he ought to remove. The maker of a note cannot be expected to account for what may have happened to it after it left his hands; but a payee or indorsee who takes it, condemned and discredited on the face of it, ought to be prepared to show what it was when he received it."

*CHAPTER XXV.

[*260]

OF THE FORGERY OF BILLS AND NOTES.

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FORGERY is the counterfeit(*a*) making or altering of any writing, with intent to defraud.(1) It is a misdemeanor at common law, punishable by fine and imprisonment,(*b*) and a conviction of it, as to any other species of *crimen falsi*, makes a man infamous, and formerly rendered him incompetent as a witness.(*c*)

The following statutes, viz., the 2 Geo. 2, c. 25, s. 1 (made perpetual by the 9 Geo. 2, c. 18), the 31 Geo. 2, c. 22, s. 78, the 7 Geo. 2, c. 22, and the 45 Geo. 3, c. 89, erect the forgery of bills or notes, or of any part of them, and the uttering of them, knowing them to be forged, into capital felonies.

The 11 Geo. 4, and 1 Wm. 4, c. 66, which consolidated the statute *law relating to forgery, repealed the above acts, but(*d*) continued the punishment of death for forgery of bills and notes, [*261] and of any undertaking, warrant, or order, for the payment of money, and for the uttering them, knowing them to be forged.

(*a*) See *Reg. v. White*, 1 Den. C. C. 208.

(*b*) 4 Bla. Com. 248.

(*c*) Com. Dig. Testm. A. 5; *Rex v. Davis*, 5 Mod. 74. He is now capacitated by 6 & 7 Vict. c. 85.

(*d*) Sect. 3.

(1) *Ames's case*, 2 Greenl. 365; *Commonwealth v. Ladd*, 15 Mass. 526; *People v. Shull*, 9 Cowen, 778; *Barnum v. State*, 15 Ohio, 717.

The 2 & 3 Wm. 4, c. 122, s. 1, substitutes for the punishment of death, the punishment of transportation for life.(e)

The result of the existing enactments, therefore, is, that, the forgery of bills or notes, or of any part of them, and the uttering of them, knowing them to be forged, are respectively felonies, punishable by transportation for life.

Forging or uttering such a bill or note as the Legislature has declared void, is not within the statutes, as, for example, a bill or note for less than 20s., or a bill or note for less than 5*l.*, which does not comply with the requisites of 17 Geo. 3, c. 30.(f)

Where there is no payee, or no maker's name, it has been held that the offence is not within the act.(g)

A mere informality, as the omission of the word POUNDS in the body, where the letter £ preceded the figures 50 in the margin,(h) does not prevent the crime amounting to forgery.

In order to constitute forgery, it is not necessary that the instrument should be duly stamped, or stamped at all.(i)

The most common species of forgery is, fraudulently writing the name(k) of an existing person. But the misapplication of *a
[*262] genuine signature is as much forgery as the making a false

(e) The only forgeries recently capital were of wills, and of powers of attorney to transfer stock, or receive dividends; 2 & 3 Wm. 4, c. 123, s. 2; and even as to these the capital punishment is now taken away by 7 Wm. 4, and 1 Vict. c. 84, s. 1.

(f) *Rex v. Moffatt*, 1 Leach, 431; 2 East, P. C. 954, S. C.

(g) *Rex v. Richards, R. & R.*, C. C. 193; *Rex v. Randall, R. & R.* C. C. 195; and see as to other fatal defects, *Rex v. Jones, Doug.* 287; *Rex v. Pateman, R. & R.* 455, where there was no maker's name; *Rex v. Burke, R. & R.* 496; *Rex v. Wilcox, Bayley*, 6th ed. 11. To constitute the forgery of a bill of exchange within 1 Wm. 4, c. 66, s. 4, the instrument must be complete. Forging an acceptance to an instrument in the form of a bill, but without the drawer's name, is not within the statute. *Reg. v. Butterwick*, 2 Moo. & R. 196.

(h) *Rex v. Post, R. & R.* 101, and *Bayley*, 11; and see *Collison's case*, 2 Leach, 1048.

(i) *Teague's case*, 2 East, P. C. 979; *Rex v. Hawkeswood*, 1 Leach, 257; 2 East, P. C. 955, S. C.; *Rex v. Lee*, 1 Leach, 258, n.; *Merton's case*, 2 East, P. C. 955.

(k) Making a mark, and suffering the assumed name to be written against it, is forgery. *Rex v. Dunn*, 1 Leach, 57; 2 East, P. C. 962. Putting the address of an existing person to a name, being the name of another person, is forgery. *Reg. v. Blenkinsop*, 1 Den. C. C. 276.

one. Thus, where the prisoner, having in his possession the genuine signature of one Thomas Gibson, wrote over it a promissory note for 6400*l.*, he was indicted and convicted of having forged the note.^(l) And where the same prisoner, having the genuine signature of Samuel Edwards, wrote on the other side of the paper a promissory note, payable to Samuel Edwards, and turned the genuine signature into an indorsement, he was convicted of forging the indorsement.^(m) So if a clerk be intrusted to fill up a blank check signed by his master with a particular sum, and he fraudulently inserts a larger sum, it is a forgery of the check.⁽ⁿ⁾

To sign the name of a fictitious or non-existing person is forgery.^(o) Where the prisoner was convicted of forging an order for payment of money, and it appeared that he had bought goods from the prosecutor, and paid for them with a draft signed in the fictitious name of H. Turner, although the prosecutor had sworn that he gave credit to the prisoner, and not to the draft, it was held that the prisoner was rightly convicted. The Judges said that it was a false instrument, not drawn by any such person as it purported to be, and that the using a fictitious name was only for the purpose of deceiving.^(p) But the signing a fictitious name will not amount to forgery, if it were used on other occasions as well as for that very fraud, or system of fraud, of which the forgery forms a part.^(q) Where proof is given of the prisoner's real name, and no proof of any change of name until the time of the fraud committed, it lies on the prisoner to show that he has before assumed the false name on other occasions, and for other purposes unconnected with forgery.^(r)

It is a forgery, also, to sign a man's own name with intention that the signature should pass for the signature of another person of the

^(l) *Rex v. Hales*, 17 St. Tr. 161.

^(m) *Ibid.* 209, 229.

⁽ⁿ⁾ *Reg. v. Wilson*, 17 L. J. Mag. Ca. 82; 1 Den. C. C. 284, S. C.; *Rex v. Hart*, 1 M. C. C. 486.

^(o) *Rex v. Francis*, Bayley, 6th ed. 572; *Rus. & Ry.* 209; *Lockett's case*, 1 Leach, 94; *East's P. C.* 940; *Taft's case*, 1 Leach, 172; *East, P. C.* 959; or in the prisoner's own name to represent a fictitious form; *Reg. v. Rogers*, 8 C. & P. 629, *E. C. L. R.* vol. 34.

^(p) *Shepherd's case*, 1 Leach, 226; 2 *East, P. C.* 967; *Whiley's case*, *R. & R.* 90.

^(q) *Rex v. Bontien*, *R. & R.* 260.

^(r) *Peacock's case*, *R. & R., C. C.* 278.

same name.(s) And where a person, whose name was Thomas Brown, [*263] was indicted for forging a *promissory note signed Thomas Brown, and it appeared that he had uttered the note as a note of Captain Brown, a fictitious person, and the prisoner was convicted, the Judges held the conviction right.(t) But the adoption of a false description and addition, where a false name is not assumed, is not forgery. Thus, where the prisoner drew a bill, and directed it "to Mr. Thomas Bowden, baize manufacturer, Romford, Essex;" and it was accepted by one Thomas Bowden, but there was no Thomas Bowden of Romford, it was held by a majority of the Judges, that the giving a false description of Bowden on the bill, with intent to defraud, was not forgery.(u)

Where the signature on the bill is genuine, an uttering by another person, with a representation that he is the person whose signature is on the bill, is not forgery, or a felonious uttering. The prisoner uttered a bill purporting to be payable to Bernard M'Carthy, or order, and having the indorsement B. M'Carthy thereon; he was indicted for forging that indorsement, and uttering it, knowing it to be forged; the jury found that there was such a man as B. M'Carthy, and that the indorsement was his handwriting, but that the prisoner passed himself off as that B. M'Carthy when he uttered the bill. The Judges were unanimous, that as the indorsement was not forged, the prisoner was not liable to be convicted.(v)

Writing a principal's name "per procuration," but without authority, is not forgery;(w) nor as it should seem writing merely another man's name under a false pretence of authority,(x) without any intention of imitating his handwriting.(1)

(s) Mead v. Young, 4 T. R. 28.

(t) Rex v. Parkes, 2 Leach, 775.

(u) Webb's case, R. & R., C. C. 405; 3 B. & B. 229, E. C. L. R. vol. 7, S. C.; Rex v. Watts, R. & R., C. C. 436; 6 Moore, 442; 3 B. & B. 197, E. C. L. R. vol. 7, S. C.

(v) Rex v. Hevey, 1 Leach, 229; 2 East, P. C. 556, S. C.; Bayley, 577.

(w) Reg. v. White, 1 Den. C. C. 208.

(x) Ibid.

(1) If a merchant write his name on blank pieces of paper, and intrust them to his clerk for the purpose of having promissory notes filled out, and a person by false pretences obtains possession of one of them, and fills up a note for his own use, he does not thereby commit the crime of forgery. Putnam v. Sullivan, 4 Mass. 45.

Every fraudulent alteration, whether by subtraction, addition, or substitution, is forgery, and would be so within the statutes even did they not contain the word *alter*, as was decided on 2 Geo. 2, c. 15, which did not contain that word.^(y) The statutes 11 Geo. 4 and 1 Wm. 4, c. 66, contain the word “alter” as well as “forge.” Nevertheless, an alteration may be described in the indictment as forgery.^(z) So, *e converso*, the discharging one indorsement and the *insertion of another, may be described as the *alteration* of an [264] indorsement.^(a)

Procuring a man to forge is an offence within the statute.^(b)

It has been decided, that, in order to constitute an uttering, the instrument must be parted with, or tendered, or offered, or used in some way to get money or credit upon it.^(c) Therefore, where the defendant, in order to persuade an innkeeper that he was a man of substance pulled out of his pocket-book a 500*l.* and a 50*l.* note, and saying that he did not like to carry so much property about him, delivered them to the innkeeper to take charge of them for him, it was held that this did not amount to an uttering.^(d)

Procuring to utter has been held a common law felony only.^(e)

But procuring to utter, if the person procured were ignorant of the felony, is a statutable felony in the procurer.^(f)

Before the recent act of Parliament it was necessary to set out the forged instrument in the indictment in words and figures correctly: the slightest variance would have entitled the defendant to an acquittal. But now, the 2 & 3 Wm. 4, c. 133, s. 2, enacts, in order to prevent justice from being defeated by clerical or verbal inaccuracies, that, in all informations or indictments for forgery, or in any manner uttering any instrument or writing, it shall not be necessary to set forth any copy or fac simile thereof, but it shall be sufficient to de-

(y) *Rex v. Elsworth, Bayley*, 6th ed. 574; 2 East, P. C. 986.

(z) *Rex v. Teague, R. & R.*, C. C. 33; 2 East, P. C. 979, S. C.; *Rex v. Post, R. & R.* 101; *Rex v. Treble*, 2 Taunt. 328; 2 Leach, 1040; *R. & R.* 164.

(a) *Rex v. Birkett, R. & R.* 251.

(b) *Rex v. Morris, Bayley*, 6th ed. 580; *R. & R.* 270, S. C.

(c) *Rex v. Shukard, R. & R.* 200.

(d) *Ibid.*; and see *Holden's case, R. & R.* 154; 2 Leach, 1019, S. C.; *Palmer's case, R. & R.* 72; 2 Leach, 978, S. C.; *Rex v. Morris, R. & R.* 270; *Reg. v. Hill*, 2 M. C. C. 30.

(e) *Rex v. Morris, Bayley*, 6th ed. 580.

(f) *Bayley*, 6th ed. 581.

scribe the same in such a manner as would sustain an indictment for stealing the same, any law or custom to the contrary notwithstanding.

An indictment for the larceny, and therefore now for the forgery of a bill or note, may describe it, generally, as a bill of exchange or promissory note for the payment of the sum therein mentioned, without setting out the instrument.*(g)* *But if it be alleged in [*265] the indictment to have been signed or made by any person, the signature must be proved.*(h)*

If several make distinct parts of the instrument, they are each chargeable with the forgery of the entire instrument.*(i)* Those who knowingly prepare the paper or plates for the purpose, are forgers.*(k)*

Before the Geo. 4, c. 32, s. 2, a rule of evidence existed equally anomalous and inconvenient, that in a criminal prosecution for forgery, the party whose name was forged was incompetent as a witness, but now he is made competent by that statute in all indictments or informations for forgery or uttering, either against principals or accessories, by common law or statute.

A doubt also formerly existed, whether the making or uttering of an instrument, payable abroad, was an offence within some of the repealed statutes.*(l)* But the statutes 11 Geo. 4 and 1 Wm. 4, c. 66, s. 30, bring within the operation of the acts against forgery, instruments made, or purporting to be made, payable, or purporting to be so, out of England.*(m)*

Where the prisoner is indicted for using a fictitious name, some evidence must be given by the prosecutor that it is not his real

(g) Milne's case, Worcester Summer Assizes, 1800, decided by all the Judges; East's P. C. 602, S. C. Before this act it was held, that, in an indictment for forgery, a bank post-bill could not be described as a bill of exchange, but might be described as a bank bill of exchange. *Rex v. Birkett*, R. & R. 251.

(h) *Rex v. Craven*, R. & R., C. C. 14; 2 East, P. C. 601, S. C.

(i) *Rex v. Bingley*, R. & R., C. C. 446; *Rex v. Kirkwood*, 1 M. C. C. 304; vide *Reg. v. Cook*, 8 C. & P. 582, E. C. L. R. vol. 34.

(k) *Rex v. Dade*, 1 M. C. C. 307.

(l) *Rex v. Dick*, 1 Leach, 68; *Rex v. McKay*, R. & R., C. C. 71.

(m) The 18th sect. of 11 Geo. 4, and 1 Wm. 4, c. 66, applies to plates of promissory notes of persons carrying on the business of bankers in the province of Upper Canada.

name.(n) But where the prisoner's real name is proved, it lies on him to show that he has before assumed the false name for other purposes.(o)

Upon an indictment, for uttering forged notes, it has been held, that evidence that the prisoner has uttered other forged notes is admissible as evidence of his knowledge of the forgery.(p) But such notes must be produced, and proved to be forgeries.(q) The admissibility of evidence, as to uttering forged bills of a different kind, has been doubted.(r)

*Where a bill or note has not become payable to bearer and title is necessarily made through a forgery, even a bona fide [*266] holder for value has no right to sue upon it or even retain it;(s) and, therefore, as a general rule, if the acceptor or maker pay one who derives his title through a forgery, that will not discharge him. So, if a bill or check be altered and made payable for a larger sum than that originally inserted, should the drawee, banker, or acceptor pay it, he cannot charge the drawer for the difference.(t) But, in case any act of the drawer facilitated or gave occasion to the forgery, he must bear the loss himself. A customer of a banker, on leaving home, intrusted to his wife several blank forms or checks, signed by himself, and desired her to fill them up according to the exigency of his business. She filled up one with the words, *fifty pounds, two shillings*, beginning the word *fifty* with a small letter in the middle of the line. The figures, 52: 2. were placed at a considerable distance to the right of the printed £. She gave the check, thus filled up, to her husband's clerk, to get the money. He, before presenting it, inserted the words, "*three hundred*" before the *fifty*, and the figure 3 between the printed £ and the figures 52: 2. It was presented, and the bankers paid it. Held, that the improper mode of filling up the check had invited the forgery, and, therefore, that the loss fell on the customer and not on the banker.(u)

(n) *Rex v. Peacock*, Bayley, 6th ed. 579; R. & R. 278; *Bontien's case*, R. & R. 263.

(o) *Rex v. Peacock*, R. & R. 278.

(p) *Wylie's case*, 1 N. R. 92; *Hough's case*, R. & R. 120.

(q) *Rex v. Millard*, R. & R., C. C. 245.

(r) S. C., *Rus. & Ry.* 247. As to the prisoner's admission relating to other bills, see *Reg. v. Cook*, 8 C. & P. 586, E. C. L. R. vol. 34.

(s) *Esdaille v. Lanauze*, 1 *Younge & Col.* 394; **Johnson v. Windle*, 3 Bing. N. C. 225, E. C. L. R. vol. 32; 3 *Scott*, 608, S. C.

(t) *Hall v. Fuller*, 5 B. & C. 750, E. C. L. R. vol. 11; 8 D. & Ry. 465, S. C.; *Smith v. Mercer*, 6 Taunt. 76, E. C. L. R. vol. 1; 1 *Marsh.* 453, S. C.

(u) *Young v. Grote*, 4 Bing. 253, E. C. L. R. vol. 13; 12 *Moore*, 284, S. C. And

It is a general rule of law, that money paid under mistake, *as to facts*, may be recovered back. On this principal, if a forged note be discounted, the transferee, on discovery of the forgery, may recover back the money paid, the imagined consideration totally failing.(v) But any fault or negligence on the part of him who pays the money on the note, will disable him from recovering. Thus, where two bills of exchange, falling due at different times, were drawn on a man, and he paid the first without acceptance, and accepted and paid the [*267] second, and the signature of the drawer was, some time *afterwards, discovered to be a forgery, Lord Mansfield held, that an acceptor is bound to know the handwriting of the drawer, and that it is rather by his fault or negligence than by mistake, if he pays on a forged signature.(w) So, where a forged acceptance of the drawee was made payable at the plaintiff's, the drawee's bankers, and they paid the amount to the defendant, as a bona fide holder, but seven days afterwards, upon discovering the acceptance to be a forgery, informed the defendant of it, and demanded the money; it was held that they could not recover, for that a banker ought to know his customer's handwriting. Part of the Court held the defendant discharged, on the ground that, by the plaintiff's delay in giving notice of the forgery, he had lost his remedy against the antecedent parties.(x) Where the fault is not entirely on the side of the party paying, he may still recover. Certain bills of exchange, purporting to bear, amongst others, the indorsement of A., were refused payment; the notary took them to the plaintiff, the London correspondent of A., and asked him to take up the bills for A.'s honor. The plaintiff, accordingly, paid the money to the defendants, holders of the bills, and struck out all the indorsements subsequent to A.'s. The same morning it was discovered that the respective signatures of A., the drawer, and acceptor, were forged. Plaintiff immediately sent notice to the defendants, in time for them to advise their indorser. The Court held, that the plaintiff was entitled to recover his money back, and said, "A bill is carried for payment to the person whose

it has been held, that a principal who, through his own agent, sends money to his creditor, which is misapplied by the agent, is not responsible any further to the creditor, if the creditor's conduct facilitated the agent's fraud. *Horsfall v. Fauntleroy*, 10 B. & C. 755, E. C. L. R. vol. 21.

(v) *Jones v. Ryde*, 5 Taunt. 488, E. C. L. R. vol. 1; 1 Marsh. 157, S. C.; *Bruce v. Bruce*, 5 Taunt. 495, E. C. L. R. vol. 1; 1 Marsh. 165, S. C.

(w) *Price v. Neal*, 3 Bur. 1354; 1 Bla. R. 390, S. C.

(x) *Smith v. Mercer*, 6 Taunt. 76, E. C. L. R. vol. 1; 1 Marsh. 453, S. C.

name appears as acceptor, entirely as a matter of course. But it is by no means a matter of course to call upon a person to pay a bill for the honor of an indorser; and such a call, therefore, imports, on the part of the person making it, that the name of a correspondent, for whose honor payment is asked, is actually on the bill. The person thus called upon ought, certainly, to satisfy himself that the name of his correspondent is really on the bill; but still, his attention may reasonably be lessened by the assertion that the call itself makes to him *in fact*, though no assertion may be made in words. And the fault, if he pays on a forged signature, is not wholly and entirely his own, but begins, at least, with the person who thus calls upon him. And though, where all the negligence is on one side, it may, perhaps, be unfit to inquire into the quantum; yet, where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake into which he may, by his own prior mistake, have led the other; at least, if the mistake be discovered before any alteration *in the situa- [*268] tion of any of the other parties; that is, whilst the remedies of all parties entitled to remedy are left entire, and no one is discharged by *laches*. We think the payment, in this case, was a payment by mistake, and without consideration, to a person not wholly free from blame. The striking out an indorsement by mistake cannot, in our opinion, discharge the indorser.”(y)

So, in a similar case, where the bankers gave notice of the forgery, and demanded the money by one o'clock in the afternoon of the following day, the Court took time to consider, and at length unanimously held, that the money could not be recovered back. “In this case,” they say, “we give no opinion upon the point, whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants, on that day, to have sent notice to other parties on the bill. But *we are all of opinion, that the holder of a bill is entitled to know, on the day when it became due, whether it is an honored or dishonored bill*;(z) and that if he receives

(y) *Wilkinson v. Johnson*, 3 B. & C. 428, E. C. L. R. vol. 15; 5 D. & Ry. 403, S. C.

(z) But if a banker, on whom a check is drawn, be also the banker of the holder, who pays in the check without any intimation of the character in which he desires the banker to receive it, whether as drawee or as his, the holder's agent, it will be presumed that the banker took it as the agent of the holder; and, therefore, the banker may, in the course of the next day, inform the holder that there are no effects,

the money, and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonored by the acceptor) to take any other steps against the other parties to the bill till the day after it is dishonored. But he is entitled so to do if he thinks fit; and the parties who pay the bill ought not, by their negligence, to deprive the holder of any right to take steps against the parties to the bill on the day when it becomes due.”(a)

In an action on a forged bill, a Judge, on affidavit of the forgery, will order that the defendant and his witnesses may inspect it, the defendant giving to the plaintiff a list of the witnesses to whom he proposes to exhibit it.(b)

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*CHAPTER XXVI.

OF THE STATUTE OF LIMITATIONS IN ITS APPLICATION TO
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and that the check will not be paid. *Boyd v. Emmerson*, 2 Ad. & Ell. 184, E. C. L. R. vol. 29; 4 N. & M. 99, S. C.; and see *Kilsby v. Williams*, 5 B. & Ald. 815, E. C. L. R. vol. 7; 1 D. & C. 476, S. C.

(a) *Cocks v. Masterman*, 9 B. & C. 902, E. C. L. R. vol. 17; 4 M. & Ry. 676; Dans. & Ll. 329, S. C.

(b) Post, Chapter on *Actions*, and see *Thomas v. Dunn*, 6 M. & G. 274, E. C. L. R. vol. 46. It may be done without an affidavit. *Woolner v. Devereux*, 9 Dow. 672.

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WITHOUT a limitation of actions, no man can be secure in the enjoyment of his property. Prescription is the original source of all title. After the lapse of years, evidence is weakened or destroyed. And a claimant who has long slept on his demand has no right to complain, if, for the public advantage, it is at length taken from him. In practice, it is found, that no statutes are so useful as those of limitation, compelling, as they do, investigation whilst the means of investigation subsist, and supplying the loss of those means, by a general act of settlement, applicable to each man's case.

*Though an act of limitation, in respect of real property, [*270] was passed in this country in the year 1270, yet, partly from the comparatively inconsiderable amount of personal property, partly from the frequency of the sales in *market overt*, and partly from the circumstance, that debts above 40s. were commonly secured by bond or single bill, and debts below that amount were not tried in the superior Courts, no limitation to personal actions was introduced till the year 1623, when the present Statute of Limitation of personal actions, the 21 Jac. 1, c. 16, was passed.

The enactments of that statute, so far as they are applicable to our present purpose, are as follows :

By s. 3, all actions on the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants), and all actions of debt, grounded on any lending or contracts without specialty, must be brought within six years of the cause of such actions, and not after.

By s. 4, if judgment for the plaintiff be arrested or reversed, or the defendant be outlawed and afterwards reverse the outlawry, the plaintiff, or his executor, may commence a new action within a year.

Section 7 provides, that if any person entitled to the action shall, at the time of the cause of action accrued, be first, an infant; secondly, feme covert; thirdly, non compos mentis; fourthly, imprisoned; or, fifthly, beyond the seas, then such person may bring

the action within six years after their full age, discoverture, sound memory, enlargement, or return from beyond the seas.

In treating of the effect of this statute, in its relation to bills and notes, we shall consider, 1, its general operation, and whether it destroys the debt or only bars the remedy; 2, what actions or legal proceedings on those instruments it limits; 3, from what period the statute begins to run; 4, to what period the time of limitation is computed; 5, how the statute may be avoided by issuing a writ and continuing it down; 6, the proviso as to persons laboring under disabilities; 7, what promises, acknowledgments, or payments, will take a bill or note out of the statute; 8, how the statute is to be taken advantage of; and, lastly, when, independently of the statute, lapse of time will be a bar to an action on a bill or note.

First, as to the general operation of the statute.

The Statute of Limitation is a good plea in equity as well as at law. It is also an answer to proof under a fiat in bankruptcy.(a) It was [271] formerly a doubt whether the statute was a bar in the Admiralty Courts, to a suit for seamen's wages.(b) But that doubt was removed by 4 Anne, c. 16, s. 17, which enacts that all suits and actions in the Court of Admiralty for seamen's wages, shall be commenced and sued within six years next after the cause of such suits or actions shall accrue, and not after.

The Statute of Limitations does not destroy a debt, but only bars the remedy. Therefore, it must in all cases be pleaded, and cannot be given in evidence, even under the plea of nil debet, or the replication of nil debet to set-off.(c) Therefore, also, a promissory note more than six years old, though not a good petitioning creditor's debt *as against the bankrupt*, who may object that the remedy by a fiat in bankruptcy, as well as by action, is taken away, is nevertheless a good petitioning creditor's debt, as against strangers.(d) "It is settled," says Lord Mansfield, "that the Statute of Limitations does not destroy the debt, it only takes away the remedy; the objection

(a) Ex parte Dewdney, 15 Ves. 479.

(b) Ewer v. Jones, 6 Mod. 25.

(c) Chapple v. Durston, 1 C. & J. 1,* overruling the opinion of Lord Holt at Hertford Assizes, 1690, Anon.; 1 Salk. 278; Draper v. Glassop, 1 Ld. Raym. 153.

(d) Swayne v. Wallinger, 2 Stra. 746.

lies in the mouth of the bankrupt himself, but not in the mouth of a third person.”(e) Therefore, again, a lien may be enforced,(f) where an action for its amount would be barred by the statute.

A foreign Statute of Limitations is no defence to an action on a foreign contract in the English Courts, unless it have the effect of extinguishing the contract, and the parties are living in the foreign country at the time of the extinction. For a Statute of Limitations usually affects the remedy merely, and not the construction of the contract.(g)

Secondly, as to the actions and legal proceedings which the statute limits.

It will be sufficient for the present purpose to remark, that actions of debt and of assumpsit are limited to six years.(h) That though the statute does not in terms apply to proceedings in equity, Courts of Equity adopt its provisions as a rule.(i)

“With regard to that statute,” says Sir Wm. Grant, “though it *does not apply to any equitable demand, yet equity adopts [*272] it, or at least takes the same limitation, in cases that are analogous to those in which it applies in law.”(k) But the statute does not bar a trust,(l) nor a legacy.(m) We have already seen that the statute is a bar in bankruptcy.

The exception, as to merchants’ accounts, applies only to an action of account, or perhaps, also, to an action on the case for not accounting, but not to an action of indebitatus debt or assumpsit.(n)(1)

(e) *Quantoock v. England*, 5 Bur. 2628; 2 Bla. R. 703, S. C. See the same doctrine laid down by Lord Ellenborough and Bayley, J., in *Williams v. Jones*, 13 East, 450; and by the Court of Exchequer in *Chapple v. Durston*, 1 C. & J. 1; **Mavor v. Pyne*, 2 C. & P. 91, E. C. L. R. vol. 12.

(f) *Spears v. Hartly*, 3 Esp. 81.

(g) *Huber v. Steiner*, 2 Bing. N. C. 202, E. C. L. R. vol. 29; 1 Scott, 304, S. C. See the Chapter on *Foreign Bills and Foreign Law*.

(h) Sect. 3. (i) *Johnson v. Smith*, 2 Bur. 961; *Prince v. Heylin*, Atk. 493.

(k) *Starhouse v. Barnston*, 10 Ves. 466.

(l) *Heath v. Hanley*, 1 Cha. Ca. 20.

(m) *Anon.* 2 Freem. 22.

(n) *Inglis v. Haigh*, 8 M. & W. 769,* and see *Cottam v. Partridge*, 11 L. J. 161, C. P.; 4 M. & G. 271, E. C. L. R. vol. 43; 3 Scott, N. R. 174, S. C.

(1) *Phillips v. Cage*, 12 Smedes & Marshall, 141; *Contra, Mandeville v. Wilson*, 5 Cranch, 15; *Brackenridge v. Baltzell*, 1 Smith, 217.

As to what are merchants’ accounts, *Slacumbs v. Holmes*, 1 Howard, Miss. 786;

It is conceived, that if the statute have run out against the holder of a bill or note, payable at a day certain, and he then transfers it, the transferee's right of action is barred. For he, as transferee of an overdue bill, can stand in no better situation than his transferer. He, like his transferer, has a debt, but has lost the right of action, and has notice of the loss.^(o)

Thirdly, as to the time from which the statute runs.

The Statute of Limitations begins to run on a bill or note, as well as on any other contract, from the time that the action^(p) first accrued to the party.⁽¹⁾

Therefore, on a bill payable at a certain period after date, the statute runs, not from the time the bill was drawn, but from the time when it fell due.^(q)

So, where the maker of a note gave it to a third person, to be delivered to the payee after certain events should happen, the statute was held to run, not from the date of the note, but from the time of its delivery to the payee.^(r)

It is conceived, that if a note be payable by instalments, and contain a provision that if default be made in payment of one instalment,

(o) See *Scarpellini v. Atcheson*, 7 Q. B. 864, E. C. L. R. vol. 53; *quære* the form of pleading. It may be otherwise with a bill or note payable on demand: a banker's reissuable note for example.

(p) Though at that time an action and judgment would have been fruitless. *Emery v. Day*, 1 C. M. & R. 245; * 4 Tyr. 695, S. C.

(q) *Wittersheim v. Lady Carlisle*, 1 H. Bl. 631.

(r) *Savage v. Aldren*, 2 Stark, 232, E. C. L. R. vol. 3.

Fox v. Fish, 6 Ibid. 328; *Bevan v. Cullen*, 7 Barr, 281; *Brackenridge v. Baltzell*, 1 Smith, 217; *Marseilles v. Kenton's Exch.*, 17 Penna. State Rep. 238.

The exception is available in merchants' accounts though none of the items come within six years. *Bass v. Bass*, 8 Pick. 187; *Dyott v. Letcher*, 6 J. J. Marshall, 541; *McLellan v. Crofton*, 6 Greenl. 308.

(1) It begins to run only from the time the right of action accrued. *Richman v. Richman*, 5 Halsted, 114; *Odlin v. Greenleaf*, 3 N. Hamp. 270; *Banks v. Coyle*, 2 Marshall, 564; *Jones v. Conway*, 4 Yeates, 109; *Bennett v. Herring*, 1 Branch, 387; *Dobyns v. Schoolfield*, 10 B. Monroe, 311.

It begins to run from the last day of grace: *Pickard v. Valentine*, 1 Shepl. 412.

It does not begin to run against a bill of exchange made payable at a particular place, until after a demand at such place and a dishonor there. *Picquet v. Curtis*, 1 Sumner, 478.

the whole shall be due, the statute runs from the first default against the whole amount of the note.(s)

*And so in an action on a bill by an administrator, who had not taken out administration till after the bill became due, it [*273] was decided that the statute run, not from the time the bill fell due, but from the time of granting letters of administration, for there can be no action till there is a party capable of suing.(t)(1)

As upon a bill drawn payable at or after sight, there is no right of action till presentment; without such presentment the statute does not begin to run.(u) If a note be payable at a certain period after sight,(v) the statute runs from the expiration of that period, after the exhibition of the note to the maker.

But we have seen, that if a bill or note be payable on demand, the words "*on demand*" are held not to constitute a demand a condition precedent, but merely to import that the debt is due and payable immediately;(w) or, at any rate, an action is sufficient demand. Therefore on a bill or note payable on demand, the statute runs from the date of the instrument, and not from the time of the demand.(x)(2)

(s) See *Hemp v. Garland*, 4 Q. B. Rep. 519, E. C. L. R. vol. 45.

(t) *Murray v. East India Company*, 5 B. & Ald. 204, E. C. L. R. vol. 7. But this interval is now to be computed where the administrator claims a chattel real, 3 & 4 Wm. 4, c. 27, s. 6.

(u) *Holmes v. Kerrison*, 2 Taunt. 323.

(v) *Sturdy v. Henderson*, 4 B. & Ald. 592, E. C. L. R. vol. 6; *Sutton v. Toomer*, 7 B. & C. 416; E. C. L. R. vol. 14; 1 M. & Ry. 125, S. C.; *Holmes v. Kerrison*, 2 Taunt. 323; and see *Dixon v. Nuttall*, 1 C. M. & R. 307; * 6 C. & P. 320, E. C. L. R. vol. 25, S. C.

(w) *Capp v. Lancaster*, Cro. Eliz. 548; *Rumball v. Ball*, 10 Mod. 38; *Collins v. Benning*, 12 Mod. 444; *M'Intosh v. Haydon*, R. & M. 363.

(x) *Christie v. Fonsick*, Sel. N. P. 9th ed. 351. This case is said to have been

(1) Where an action does not accrue until after the death of the creditor, the statute does not begin to run until administration is granted, but if it accrues before his death the running is not thereby suspended. *Beauchamp v. Mudd*, 2 Bibb, 537; *Hobart v. Connecticut Turnpike Co.*, 15 Conn. 145; *Jackson v. Hitt*, 12 Vermont, 285; *Abbott v. McElroy*, 10 Smedes & Marshall, 100.

Where A. has a demand against B. which is not barred, and B. dies intestate, the statute will not begin to run until letters of administration are taken out. *Burnet v. Bryan*, 1 Halsted, 377.

The running of the statute against a claim on the estate of a person deceased is suspended during the time in which the administrator is not liable to an action thereon. *Haupt v. Shields*, 3 Porter, 247.

(2) In general the statute begins to run from the date of a note payable on de-

If a note is made payable at a certain period *after demand*, it is like a note payable after sight, the demand and the lapse of the specified time after the demand are conditions precedent, and the statute runs from the time when the note falls due.(y) And if a bill be made payable twelve months *after notice*, the statute does not begin to run till after notice and the twelve months subsequent.(z)(1)

[*274] Perhaps where the plaintiff has been the subject of fraud, *he may by a special replication avoid a plea of the statute, and postpone its application.(a)(2)

Upon the contract which the law implies to indemnify an accommodation acceptor, the statute begins to run from the time at which the plaintiff is damnified by actual payment.(b)(3)

overruled in *K. B. sed quære*. If, indeed, a bond is conditioned to be void on payment on demand, a demand must be proved, or the bond is not forfeited. *Carter v. Ring*, 3 Camp. 459. In *Megginson v. Harper*, 2 C. & Mees. 322; * 4 Tyr. 94, S. C., it was assumed that the statute ran from the date of the note, which was payable on demand. *Quære* tamen, if the note be a reissuable one, and reissued, or if it be payable at a particular place.

(y) *Thrope v. Booth*, R. & M. 388.

(z) *Clayten v. Gosling*, 5 B. & C. 360, E. C. L. R. vol. 11; 8 D. & Ry. 110, S. C.

(a) *South Sea Company v. Wymondsell*, 3 P. Wms. 143; *Bree v. Holbech*, Doug. 630; *Clark v. Hougham*, 2 B. & C. 149, E. C. L. R. vol. 9; 3 D. & Ry. 322, S. C.; *Ex parte Bolton*, 1 Mont. & Ayr. 60.

(b) *Reynolds v. Doyle*, 1 M. & Gr. 753, E. C. L. R. vol. 39; *Collinge v. Heywood*, 9 Ad. & E. 633, E. C. L. R. vol. 36.

mand. *Easton v. McAllister*, 1 Missouri, 662; *Larason v. Lambert*, 7 Halsted, 247; *Newman v. Kettell*, 13 Pick. 418; *Wenman v. Mohawk Ins. Co.*, 13 Wendell, 267; *Wilks v. Robinson*, 3 Richardson, 182; *Hill v. Henry*, 17 Ohio, 9. But see *Wolfe v. Whiteman*, 4 Harrington, 246.

(1) In case of a note payable at a given day after demand, it commences to run only from the time of the demand. *Wenman v. Mohawk Ins. Co.*, 13 Wendell, 267; *Little v. Blunt*, 9 Pick. 488; *Wright v. Hamilton*, 2 Bailey, 51.

(2) In a contract tainted with fraud, the statute runs from the time of its discovery. *Pennock v. Freeman*, 1 Watts, 401; *Sherwood v. Sutton*, 5 Mason, 143; *Turnpike v. Field*, 3 Mass. 201; *Miles v. Berry*, 1 Hill, S. C. 296; *Frankfort v. Markley*, 1 Dana, 373; *Cole v. McGlathry*, 9 Greenleaf, 131.

A fraudulent concealment of the plaintiff's cause of action will not protect him against the operation of the statute. *Smith v. Bishop*, 9 Vermont, 110; *Fee v. Fee*, 10 Ohio, 469; *Allen v. Mille*, 17 Wend. 202; *Baines v. Williams*, 3 Iredell, 481.

(3) When a surety on a promissory note pays it before maturity, his cause of action accrues against his principal for indemnity only when the note becomes pay-

If a bill be dishonored by non-acceptance, and afterwards by non-payment, the statute runs from the refusal to accept.(c)

Fourthly, as to the period up to which the time of limitation is computed.(1)

The words of the statute, 21 Jac. 1, c. 16, s. 3, are, all actions of trespass, &c., shall be *commenced* and sued within six years, &c.

Therefore, when, according to the old practice, writs bore teste of a day before the day of issuing them, it was held that the time within which the action should be brought must be computed, not to the teste, but to the issuing of the writ.(d)

At present, no difficulty on this subject can exist, as the date and teste of a writ are the same.(e)

Where an action is commenced in an inferior Court, and removed into a superior Court, the time of limitation is computed only to the commencement of the action in the inferior Court.(f)

When the statute once begins to run, it never stops, except in the cases mentioned in the fourth section, although circumstances should arise in which it is impossible to sue, as if, for example, the debtor die, and no executor be appointed.(g)

Fifthly, as to the mode in which the operation of the statute may be obviated by issuing a writ and continuing it down.

(c) *Whitehead v. Walker*, 9 M. & W. 506.*

(d) *Johuson v. Smith*, 2 Bur. 950.

(e) 2 Wm. 4, c. 39, s. 12.

(f) *Bevin v. Chapman*, 1 Sid. 228; *Matthews v. Phillips*, 2 Salk. 424.

(g) *Rhodes v. Smethurst*, 4 M. & W. 42;* affirmed in error, 6 M. & W. 351,* post, 276.

able. *Tillotson v. Rose*, 11 Metc. 299; *Farmers' Bank v. Gibson*, 6 Barr, 57; *Jackson v. Adamson*, 7 Blackford, 597.

Where one not a party to a note divides with the maker the consideration for which it was given, promising the maker to pay his half of the amount when the note becomes due, the statute will begin to run in bar of a suit for a breach of this promise, as soon as the note becomes due and unpaid; nor will its subsequent payment in full, by the maker, raise an implied assumpsit to him by the party who made such promise for money paid and advanced. *Joiner v. Perry*, 1 Strobhart, 76.

Interest is never barred till the principal is. Thus, if interest is payable yearly, on a note having several years to run, the statute does not begin against the interest until the principal is due. *Grafton Bank v. Doe*, 19 Vermont, 463.

(1) The day on which the cause of action accrued is to be included, as an action might have been commenced on that day. *Presbrey v. Williams*, 15 Mass. 193.

In computing time under the statute, the first day is to be excluded, and the last to be included. *Smith v. Cassity*, 9 B. Monroe, 496.

According to the old practice, the plaintiff might issue a writ, and without serving it on the defendant, keep it in his pocket, and get it returned at any time within the six years, ^(h) *then file it (for [*275] it must have been filed), ⁽ⁱ⁾ and enter continuance at any time, down to the writ on which the appearance was, and by replying the writ with the continuance, obviate the effect of the statute. ^(j) (1)

But this practice is abolished by the Uniformity of Process Act. ^(k) By that Act, no first writ affects the operation of the statute, unless the defendant has been arrested or served with it, or proceedings to outlawry have been had upon it, *or unless* the writ and every continuing writ is returned non est inventus, and entered of record within one calendar month from its expiration; and each succeeding writ must issue within a month of the expiration of the preceding, and contain a memorandum ^(l) specifying the date of the first writ. The return of bailable process is to be made by the sheriff; of non-bailable, by the plaintiff or his attorney.

A bill in equity, filed by one creditor on behalf of himself and the other creditors, will prevent the Statute of Limitations from running against any of the creditors who come in under the decree. ^(m)

Sixthly, as to the saving clause in favor of infants, married women, lunatics, persons imprisoned or beyond seas.

An infant would have been bound, had he not been expressly ex-

^(h) Taylor v. Hipkins, 5 B. & Ald. 489, E. C. L. R. vol. 7.

⁽ⁱ⁾ Harris v. Woolford, 6 T. R. 617.

^(j) The first instance of a latitat replied, is in Cole v. Sybsye, Styles's R. 156, A.D. 1649; and see Dacy v. Clinch, 1 Sid. 53. As the form of the plea now is, that the action did not accrue within six years before the commencement of the suit, it is not proper to reply the writ, but to traverse the plea and give the writ in evidence by producing the roll. Dickenson v. Teague, 1 C. M. & R. 241.*

^(k) 2 Wm. 4, c. 39, s. 10.

^(l) Of which the roll is no evidence. Walker v. Collick, 4 Exch. Rep. 171.*

^(m) Sterndale v. Hankinson, 1 Sim. 393.

(1) The commencement of a suit to defeat the statute must be the same suit to which the plea is pleaded. Delaplain v. Crowninshield, 3 Mason, 329; Soulden v. Van Rensellaer, 3 Wend. 473; Davis v. West, 5 Ibid. 63; Sherman v. Barnes, 8 Conn. 138; Callis v. Waddy, 2 Munf. 511; Harris v. Dennis, 1 Serg. & Rawle, 236; Ontario Bank v. Rathbun, 19 Wendell, 291; Ivins v. Schooley, 3 Harrison, 269; Cheney v. Archer, Riley, 195; Connell v. Moulton, 3 Denio, 12.

cepted.(n) For infants may, during the six years, sue by their guardians.(o) An infant cestui que trust, is bound by the laches of his trustee, even in equity.(p)

In the old Statutes of Limitations, passed before the union with Scotland, the saving clause in favor of absent claimants protected claimants "out of the realm;" but the statute 24 Jac. 1, c. 16, being after the Union, changed the expression, "out of the realm," to the expression "beyond the seas." Scotland, therefore, is not within the saving;(q) *but Dublin, or any other place in Ireland, India,(r) [*276] or the colonies, was. Now by the 3 & 4 Wm. 4, c. 42, s. 7, no part of the British Isles is to be deemed beyond the seas.(s) Foreigners are within the benefit of this saving. "If the plaintiff," say the Court of C. P., "is a foreigner, and doth not come to England in fifty years, he still has six years after his coming into England to bring his action. And if he never comes into England himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death."(t) If one only of the several *plaintiffs* be abroad, the case is not within the exception.(u)(1)

Nor is the *defendant's* absence beyond seas(v) a case within it, though it is a case in which the saving is much more necessary than when the plaintiff himself is absent, as an absent plaintiff may sue a defendant in England, but a defendant beyond seas cannot be sued

(n) *Prideaux v. Webber*, 1 Lev. 31.

(o) *Chandler v. Vilett*, 2 Saun. 121, a.

(p) *Wych v. East India Company*, 3 P. Wms. 309.

(q) *King v. Walker*, 1 W. Bl. 287.

(r) *Parnter v. Gaitskell*, 13 East, 432.

(s) *Nightingale v. Adams*, 1 Show. 91.

(t) *Strithorst v. Græme*, 3 Wils. 145; 2 W. Bl. 723, S. C.; *Le Vaux v. Berkeley*, 5 Q. B. Rep. 836, E. C. L. R. vol. 48; *Townsend v. Deacon*, 18 L. J. 298; 3 Exch. Rep. 706,* S. C. Query, whether the executors are limited to six years after the testator's death. *Ibid*.

(u) *Perry v. Jackson*, 4 T. R. 516; *secus*, one of several defendants. *Fannin v. Anderson*, 7 Q. B. 811, E. C. L. R. vol. 53.

(v) *Hall v. Wyborn*, 1 Shew. 98; 1 *Swayn v. Stephens*, Cro. Car. 333.

(1) The words "beyond seas" in the statute of limitations of a state, means out of the limits of that state. *Murray v. Baker*, 3 Wheat. 541; *Shelby v. Grey*, 11 Wheat. 361; *Bank of Alexandria v. Dyer*, 14 Peters, 141; *Pancoast v. Addison*, 1 Har. & Johns. 350; *Richardson v. Richardson*, 6 Ham. 125; *Field v. Dickenson*, 3 Pike, 409.

Contra: *Whitlocke v. Walton*, 2 Murph. 23; *Earle v. McDowell*, 1 Dev. 16; *Thurston v. Dawes*, 9 Serg. & R. 288.

in England at all. To remedy this hardship, the statute 4 & 5 Anne, c. 16, s. 19, enacts, that if at the accruing of the action the defendant be beyond the seas, the plaintiff may bring his action within six years after the defendant's return. A mere setting foot on English ground is not a return within the statutes.^(w) If one of several *co-defendants* in an action *ex contractu*, be abroad, the Statute of Limitations does not begin to run.^(x)

When a disability is removed, and the statute once begins to run, no supervening disability will stop it.^(y)(1)

Seventhly, as to the promises, acknowledgments, or payments, which take a bill or note out of the statute.⁽²⁾

(w) *Gregory v. Hurrill*, 1 Bing. 324, E. C. L. R. vol. 8; 8 Moore, 189, S. C.

(x) *Fannin v. Anderson*, 7 Q. B. 811, E. C. L. R. vol. 53.

(y) *Doe dem. Durore v. Jones*, 4 T. R. 310; *Smith v. Hill*, 1 Wils. 134; *Gray v. Mendez*, 1 Stra. 556; *Rhodes v. Smethurst*, 4 M. & W. 42,* ante, 274; 6 M. & W. 351,* in error.

(1) The disability which entitles a party to the benefit of the proviso must exist when the right of action first accrues, and if several disabilities exist together, the statute does not begin to run until the whole are removed. *Jackson v. Johnson*, 5 Cowen, 74; *Jackson v. Wheat*, 18 Johns. 40; *Butler v. Howe*, 1 Shepl. 397; *Starke v. Starke*, 3 Richardson, 438.

Where the statute has commenced to run, no subsequent disability can stop it. *Peck v. Randall*, 1 Johns. 165; *Rogers v. Hillhouse*, 3 Conn. 398; *Crosier v. Gana*, 1 Bibb, 257; *Mercer v. Selden*, 1 Howard, U. S. 37; *South v. Thomas*, 7 Monroe, 59; *McDonald v. Johns*, 4 Yerger, 258; *Den v. Richards*, 3 Greenl. 347; *Dillard v. Philson*, 5 Strobhart, 213.

(2) The acknowledgment must be clear and explicit, not inconsistent with an immediate promise to pay absolutely or unconditionally. *Harrison v. Handley*, 1 Bibb, 443; *Ash v. Patton*, 3 Serg. & Rawle, 300; *Head v. Manners*, 5 J. J. Marsh. 25; *Bell v. Morrison*, 1 Peters, 351; *Bradley v. Field*, 3 Wendell, 272; *Lawrence v. Hopkins*, 13 Johns. 288; *Atwood v. Coburn*, 4 N. Hamp. 315; *Tichenor v. Colfax*, 1 Southard, 153; *Bank v. Sullivan*, 6 N. Hamp. 124; *Russell v. Copp*, 5 N. Hamp. 154; *Marshall v. Dalliber*, 5 Conn. 480; *Fries v. Boisdelet*, 9 Serg. & Rawle, 128; *Hudson v. Carey*, 11 Ibid. 10; *Bailey v. Bailey*, 14 Ibid. 195; *Bracket v. Mountfort*, 3 Fairf. 72; *Roger v. Waters*, 2 Gill & Johns. 64; *Hancock v. Bliss*, 7 Wend. 267; *Allison v. Pennington*, 7 Watts & Serg. 180; *Fellows v. Guimann*, *Dudley*, Geo. 100.

There must be either an absolute promise to pay the debt, or a conditional promise accompanied by proof of performance of the condition, or an unambiguous acknowledgment of the debt as still existing and due. *Porter v. Hill*, 4 Greenl. 41; *Deshon v. Eaton*, Ibid. 413; *Bell v. Morrison*, 1 Peters, 351; *Bush v. Barnard*, 8 Johns, 407; *Robbins v. Otis*, 1 Pick. 368.

There must be an express promise to pay, or an admission of a subsisting debt which the party is willing to pay. *Horlbeck v. Horlbeck*, 1 McMullan, 197; *Waples v. Lay-*

It was at first held, that nothing short of an express promise would take a debt out of the statute; (z) then that a mere acknowledgment (z) *Dickson v. Thomson*, 2 Show. 126.

ton, 3 Harr. 508; *Brown v. Joyner*, 1 Richardson, 210; *Kelly v. Sanborn*, 9 N. Hamp. 46; *Williamson v. King*, 2 McMullan, 505; *Davidson v. Morris*, 5 Smedes & Marsh. 564; *Cocks v. Weeks*, 7 Hill, 45; *Farley v. Kustenbader*, 3 Barr, 418; *Manning v. Wheeler*, 13 N. Hamp. 486; *Ventris v. Shaw*, 14 Ibid. 422; *Kensington Bank v. Patten*, 14 Penna. State Rep. 479; *Brown v. State Bank*, 5 English, 134; *Harbold's Ex'rs v. Kuntz*, 16 Penna. State Rep. 210.

The acknowledgment must admit that the debt continues due at the time of the acknowledgment. *Bangs v. Hall*, 2 Pick. 368; *French v. Frazier*, 7 J. J. Marshall, 425; *Wetzell v. Bussard*, 11 Wheat. 310; *Oliver v. Gray*, 1 Har. & Gill, 204; *Ferguson v. Taylor*, 1 Hayw. 20; *Belles v. Belles*, 7 Halst. 339; *Purdy v. Austin*, 3 Wend. 187; *Barlow v. Bellamy*, 7 Vermont, 54.

It has been held in some cases, that a general acknowledgment of a subsisting indebtedness, without specifying the amount of the debt or the balance due, is sufficient. *Lord v. Harvey*, 3 Conn. 370; *Whitney v. Bigelow*, 4 Pick. 110. But the weight of authority undoubtedly is, that the acknowledgment must clearly refer to the very debt in dispute between the parties. *Clarke v. Dutcher*, 9 Cowen, 674; *Bell v. Morrison*, 1 Peters, 351; *Lockhart v. Eaves*, Dudley, S. C. 321; *Pray v. Garcelon*, 5 Shepl. 145; *Dinsmore v. Dinsmore*, 8 Ibid. 433; *Davis v. Hefring*, 6 Missouri, 21; *Thompson v. French*, 10 Yerger, 453; *Robbins v. Farley*, 2 Strobbart, 348; *Martin v. Broach*, 6 Georgia, 21; *Davis v. Steiner*, 14 Penna. State Rep. 275; *Arcy v. Stephenson*, 11 Iredell, 86.

An admission by an individual that there is something due from him on account, with a promise of payment, will take a case out of the statute, but will justify a recovery only for a nominal sum. *Kittridge v. Brown*, 9 N. Hamp. 377.

When part of an account is barred, an admission of indebtedness and a general promise to settle and pay, is not such a new promise as will take the case out of the statute, for it may refer to that part unaffected by the statute. *Morgan v. Walton*, 4 Barr, 321.

A conditional promise to pay a specified demand, where the other party refuses to accede to the condition annexed, is not sufficient to take the demand out of the operation of the statute, either as a promise to pay or an admission of present indebtedness. *M'Lellan v. Albee*, 5 Shepl. 184; *Didier v. Davison*, 2 Sandf. Ch. Rep. 61.

Where the promise is conditional, the plaintiff must show that the terms have been fulfilled so as to make the promise absolute. *Brown v. Joyner*, 1 Richardson, 210; *Tompkins v. Brown*, 1 Denio, 247; *Farmers' Bank v. Clarke*, 4 Leigh, 603; *Shaw v. Newell*, 1 Rhode Island, 488.

Where the acknowledgment is accompanied with circumstances or declarations, showing an intention to insist on the benefit of the statute, no promise to pay can be implied. *Bangs v. Hall*, 2 Pick. 368; *Danforth v. Culur*, 11 Johns. 146; *Hay v. Kramer*, 2 Watts & Serg. 137; *McGlensey v. Fleming*, 4 Dev. & Batt. 129.

A promise not to plead the statute of limitations will take a case out of the operation of the statute. *Lowry v. Dubon*, 2 Bailey, 425; *Warren v. Walker*, 10 Shepl. 453.

Such a promise must itself of course be within the time.

would, as evidence of a promise; and that a part payment of principal or interest amounted to an *acknowledgment.^(a) The effect of these decisions was nearly to repeal the statute. Their consequences were somewhat restrained by the case of *Tanner v. Smart*,^(b) in which it was decided that a new promise or acknowledgment did not operate by drawing down the original promise, but by giving a new cause of action; and that the promise stated in the replication is to be considered as the promise laid in the declaration, and must be consistent with it.⁽¹⁾

At length, further to restrain the mischief, the late learned Lord Chief Justice of the King's Bench introduced the act 9 Geo. 4, by which it is enacted,^(c) that no acknowledgment or promise *by words only* shall take a case out of the statute, unless in writing, and signed by the party chargeable.

That where there are several joint contractors or executors, one shall not lose the benefit of the statute through a written acknowledgment signed by the other, but the plaintiff shall recover against the acknowledging party only.

That the effect of *payment* of principal or interest, by any person, shall remain as before the statute.

In considering the operation of this and other parts of the act 9 Geo. 4, c. 14, on the 21 Jac. 1, c. 16, in respect of acknowledgments, promises, or payments, as to bills or notes otherwise barred by the statute of James, we shall inquire, first, what sort of an acknowledgment, promise, or payment, it must be, to take a debt out of the statute; secondly, at what time it must be made; thirdly, by whom; fourthly, to whom; and lastly, by what evidence it must be proved.

(a) *Hollis v. Palmer*, 2 Bing. N. C. 713, E. C. L. R. vol. 29; 3 Scott, 265, S. C.

(b) 6 B. & C. 603, E. C. L. R. vol. 13.

(c) Cap. 14, s. 1.

(1) The acknowledgment revives the old debt, and does not create a new obligation. *Newlin v. Duncan*, 1 Harrington, 204; *Love v. Hackett*, 6 Georgia, 486. But see *Sims v. Radcliffe*, 3 Richardson, 287; *Austin v. Bostwick*, 9 Conn. 496.

Under a general replication to a plea of the statute, evidence of an acknowledgment or promise to pay within the time is admissible. *Hunter v. Starkes*, 8 Humphrey, 656.

An acknowledgment or promise to pay a debt, sufficient to take it out of the statute, may be made after the commencement of the suit. *Danforth v. Culver*, 11 Johns. 146.

First, as to the sort of acknowledgment, promise, or payment which will save the statute.

An acknowledgment, before the 9 Geo. 4, c. 14, must have been such an acknowledgment as implies a promise to pay, and must be so still. "The statute," says Tindal, C. J., "did not intend, as it appeared to us, to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof, substituting the certain evidence of a writing signed by the party chargeable instead of the insecure and precarious testimony to be derived from the memory of witnesses."*(d)* Therefore, the acknowledgment must not be [*278] *accompanied with expressions repelling the inference of a promise to pay;*(e)* but the true meaning of any such expression is a question of fact for a jury;*(f)* and if the promise be conditional, the condition must be shown to have been performed.*(g)* "There must," says Rolf, B., "be a *promise* to pay; but from a simple acknowledgment the law implies a promise."*(h)* It is sufficient if the acknowledgment or promise ascertain, either expressly or by reference, the amount due,*(i)* or if it leave the amount to be supplied by parol evidence. Where in an action against the acceptor of a bill of exchange, to take the case out of the statute, a letter by the defendant, promising "to pay the balance," was produced, but the letter did not spe-

(d) Haydon v. Williams, 7 Bing. 166, E. C. L. R. vol. 20; 4 M. & P. 811, S. C.

(e) Fearn v. Lewis, 6 Bing. 349, E. C. L. R. vol. 19; 4 M. & P. 1, S. C.; Scales v. Jacob, 3 Bing. 638, E. C. L. R. vol. 11; 11 Moore, 553, S. C.; Ayton v. Bolt, 4 Bing. 105, E. C. L. R. vol. 13; 12 Moore, 305, S. C.; Kennett v. Millbank, 8 Bing. 38, E. C. L. R. vol. 21; 1 M. & Scott, 102, S. C.; Brigstock v. Smith, 1 C. & Mees. 483; *Spong v. Wright, 9 M. & W. 629.*

(f) Wainman v. Kynman, 1 Exch. Rep. 118.*

(g) Tanner v. Smart, 6 B. & C. 603, E. C. L. R. vol. 13; 9 D. & R. 549, S. C.; Kennett v. Millbank, 8 Bing. 38, E. C. L. R. vol. 21; 1 M. & Scott, 102, S. C.; Linsell v. Bonson, 2 Bing. N. C. 241, E. C. L. R. vol. 29; 2 Scott, 399, S. C.; Humphreys v. Jones, 14 M. & W. 1; *see Howcutt v. Bonser, 3 Exch. Rep. 499.* It does not appear necessary to declare on the conditional promise. Irving v. Veitch, 3 M. & W. 90; *Edmunds v. Downes, 2 C. & M. 459; 4 Tyr. 173, S. C.; Haydon v. Williams, 7 Bing. 168, E. C. L. R. vol. 20; 4 M. & P. 811, S. C.; Gardner v. McMahon, 3 Q. B. Rep. 561, E. C. L. R. vol. 43.

(h) Hart v. Prendergast, 14 M. & W. 741; *Williams v. Griffith, 18 L. J. 210, Exch.; 3 Exch. Rep. 335,* S. C.

(i) Lechmere v. Fletcher, 1 C. & Mees. 623.* The amount may be ascertained by extrinsic evidence. Bird v. Gammon, 3 Bing. N. C. 883, E. C. L. R. vol. 32; 5 Scott, 213, S. C.; Waller v. Lacy, 1 M. & Gr. 54, E. C. L. R. vol. 39.

cify its amount, the plaintiff was held entitled to recover nominal damages.(j)

The date of a letter acknowledging a debt may be supplied by parol evidence.(k)

The construction of an ambiguous written document given in evidence, to save the statute, is for the Court, and not for the jury.(l)

Where there was a mutual and running account between the plaintiff and the defendant, any item on either side within six years would formerly have taken the whole account out of *the statute, but [*279] an item in an account not mutual would not.(m) But since Lord Tenterden's Act, there must be either payment by the defendant, or a signed acknowledgment.(n)

An account once stated is within this statute.(o)

A devise, in trust to any particular creditor, will take a debt out of the statute in equity. But a devise for the payment of debts in general will not revive a debt if the statute has run out,(p) but will, in equity, prevent the statute from running out.(q) In a recent case, Lord Brougham held, reversing a contrary decision of Sir John Leach, M. R., that a bequest of personal estate for the payment of debts will have the same effect.(r)(1)

(j) *Dickinson v. Hatfield*, 1 M. & Rob. 141; 5 C. & P. 46, E. C. L. R. vol. 24, S. C.; see *Kennett v. Millbank*, 8 Bing. 38, E. C. L. R. vol. 21; 1 M. & Scott, 102, S. C.

(k) *Edmunds v. Downes*, 2 C. & Mees. 459.*

(l) *Morrell v. Frith*, 3 M. & W. 402.* But it is a general rule, that parol evidence is admissible to explain technical terms in mercantile instruments, though the construction of the instrument is for the Court; *Ibid.* *Bowman v. Horsey*, 2 M. & Rob. 85.

(m) *Rotherby v. Munning*, 1 B. & Ad. 15, E. C. L. R. vol. 20; *Cotes v. Harris*, B. N. P. 149; *Cranch v. Kirkman*, Peake, 121; *Catling v. Skoulding*, 6 T. R. 193.

(n) *Williams v. Griffiths*, 2 C. M. & R. 45.* The exception of merchants' accounts applies only to an action of account, or to an action on the case for not accounting. *Inglis v. Haigh*, 8 M. & W. 769.*

(o) *Farrington v. Lee*, 1 Mod. 268; *Renew v. Axton*, Carth. 3; *Chievly v. Bond*, 4 Mod. 105; *Tickell v. Short*, 2 Ves. Sen. 239.

(p) *Burke v. Jones*, 2 Ves. & B. 275.

(q) *Hughes v. Wynn*, 1 Tur. & R. 307; *Hargreaves v. Mitchell*, 6 Mad. 236.

(r) *Jones v. Scott*, 1 Russ. & M. 255.

(1) *Campbell v. Sullivan*, Hardin, 17; *Man v. Warner*, 4 Whart. 455; *Agnew v.*

As a debt due from a testator's estate may exist, and yet the executor not be liable to pay, a mere acknowledgment of a debt by an executor is not sufficient to take a debt out of the statute; there must be an express promise.^(s) And it seems that a part payment by one executor will not take the case out of the statute as against his co-executor.^{(t)(1)}

It seems, that a notice in the newspaper, by a personal representative, that he will pay all debts justly due from his testator, will prevent a debt from being barred by the Statute of Limitations.^(u)

A payment must appear to be the payment of a debt, of the debt for which the action is brought, and a part payment of a larger sum.^(v) "The principle," says Parke, B., "upon which *part payment takes a debt out of the statute is, that it admits a greater debt [*280] to be due at the time of the part payment. Unless it amounts to an

(s) *Tullock v. Dunn*, R. & Moo. 416; and see *Atkins v. Tredgold*, 2 B. & C. 23, E. C. L. R. vol. 9; 3 D. & Ry. 200, S. C.

(t) *Scholey v. Walton*, 12 M. & W. 510.*

(u) *Jones v. Scott*, 1 Russ. & M. 253.

(v) *Tippetts v. Heane*, 1 C. M. & R. 252; * 4 Tyr. 772, S. C. But in *Burn v. Boulton*, 15 L. J. 97, C. P. 2 C. B. Rep. 476, E. C. L. R. vol. 52, it was held that there was a difference between a debt on a promissory note, and a debt on a quantum meruit. That, therefore, if a payment is made, less than the amount of the note, it need not be proved by any expressions at the time of payment to be a part payment, and see *Worthington v. Grimsditch*, 7 Q. B. 479, E. C. L. R. vol. 53.

Fetterman, 4 Barr, 56; *Murray v. Mechanics' Bank*, 4 Edw. Ch. 567; *Smith v. Porter*, 1 Binney, 209.

The Statute of Limitations does not operate as between a trustee and his cestui que trust to bar a trust claim. *Everts v. Nason*, 11 Vermont, 122.

Trusts which are not barred are those continuing trusts which are not cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of a court of equity. *Finney v. Cochran*, 1 Watts & Serg. 112.

() An acknowledgment by an executor or administrator will not avail. *Fritz v. Thomas*, 1 Whart. 66; *Thompson v. Peter*, 12 Wheat. 565; *Parkins v. Bennington*, 1 Harrington, 209; *Gailey v. Washington*, 2 Ibid. 204; *Peck v. Botsford*, 7 Conn. 172; *Oakes v. Mitchel*, 3 Shepl. 360; *Forney v. Benedict*, 5 Barr, 225.

Contra, *Baxter v. Penniman*, 8 Mass. 133; *Emerson v. Thompson*, 16 Ibid. 421; *Larason v. Lambert*, 7 Halsted, 247; *Newhouse v. Redwood*, 7 Alabama, 598; *Hord v. Lee*, 4 Monroe, 36; *Niemcewicz v. Bartlett*, 13 Ohio, 271.

The promise of an executor or administrator to pay a debt barred in the lifetime of the testator or intestate will not be binding; aliter, when the debt is not barred. *Reigne v. Despartes*, Dudley, S. C. 118; *McKee v. Ferguson*, Riley, 159; *Pearce v. Zimmerman*, Harper, 305; *Forney v. Benedict*, 5 Barr, 225.

admission that more is due, it cannot operate as an admission of any still existing debt."(*w*)(1)

Where a debtor owes his creditor some debts from a period longer than six years, and others from a period within six years, and pays a sum without appropriating it to any particular debt, such payment is not a payment on account, to take out of the Statute of Limitations the debts due longer than six years, but the creditor may at any time apply such payments to the debts due longer than six years.(*x*)

It has been considered doubtful, whether the giving of a bill be sufficient as a payment or acknowledgment to obviate the statute.(*y*) But if it be, the drawing of the bill is payment or acknowledgment at the time of the drawing, and not at the time of the payment by the drawee.(*z*)(2)

Goods treated as money are a sufficient payment.(*a*)

An acknowledgment, made necessary by the statute 9 Geo. 4, c. 14, is exempted by the eighth section from the Stamp Act, to which,

(*w*) *Worthington v. Grimsditch*, 7 Q. B. 479, E. C. L. R. vol. 53; see *Gowan v. Forster*, 3 B. & Ad. 510, E. C. L. R. vol. 23.

(*x*) *Mills v. Fowkes*, 5 Bing. N. C. 455, E. C. L. R. vol. 35; 7 *Scott*, 444, S. C.; *Waller v. Lacy*, 9 L. J. 217, C. P.; 1 *Scott*, 186; 1 *M. & Gr.* 54, E. C. L. R. vol. 39, S. C.

(*y*) *Gowan v. Forster*, 3 B. & Ad. 507, E. C. L. R. vol. 23.

(*z*) *Ibid.* *Irving v. Veitch*, 3 *Mees. & W.* 90.*

(*a*) *Hart v. Nash*, 2 C. M. & R. 337;* *Hooper v. Stevens*, 7 C. & P. 260, E. C. L. R. vol. 32; 4 *Ad. & E.* 71; 5 *N. & M.* 635; 1 *Har. & W.* 480, S. C.; and see as to the evidence, *Moore v. Strong*, 1 *Bing. N. C.* 441, E. C. L. R. vol. 27.

(1) Part payment of an account, barred by the statute, removes the bar as to the remainder. *Strong v. McConnell*, 5 *Vermont*, 338; *Carshore v. Huyck*, 6 *Barb. S. C.* 583; *State Bank v. Woody*, *English*, 638; *Contra*, *Smith v. Westmoreland*, 12 *Smedes & Marshall*, 663.

An indorsement made on the back of a note in the handwriting of the payee is not such evidence of a part payment as to take the note out of the operation of the statute. *Clapp v. Ingersoll*, 2 *Fairfield*, 83; see *Coffin v. Buchanan*, 3 *Fairfield*, 471; *McGehee v. Grue*, 7 *Porter*, 537; *Connelly v. Pierson*, 4 *Gilman*, 108.

Contra, if proved to have been made before the bar had attached. *Addams v. Seitzinger*, 1 *Watts & Serg.* 243; *Concklin v. Pearson*, 1 *Richardson*, 391; *Alston v. State Bank*, 4 *English*, 455.

(2) A negotiable note given by a debtor for part of a debt is payment of such part, and takes the debt out of the statute. *Isley v. Jewett*, 2 *Metc.* 168.

as an agreement, it would otherwise have been subject.(b) But if it amount to a promissory note, the exempting clause does not apply, and a stamp is necessary.(c)

A mere parol statement of an antecedent debt without any new contract or consideration made within six years before action brought, does not constitute a sufficient cause of action to prevent the operation of the Statute of Limitations.(d) But where there are cross demands of which there is a mutual settlement by the statement of a balance, the case is taken out of the statute,(e) because, as observed by Mr. Baron Alderson, **"The truth is, that the going through [281] an account with items on both sides converts the set-off into payments."*(f)(1)

(b) *Morris v. Dixon*, 4 Ad. & E. 845, E. C. L. R. vol. 31; 6 N. & M. 438, S. C.

(c) *Jones v. Ryder*, 4 M. & W. 32.*

(d) *Ibid.*, overruling *Smith v. Forty*, 4 C. & P. 126, E. C. L. R. vol. 19.

(e) *Ashby v. James*, 11 M. & W. 542; * *Worthington v. Grimsditch*, 7 Q. B. 479, E. C. L. R. vol. 53; *Pott v. Clegg*, 16 M. & W. 327; * 16 L. J. 210, Exch.

(f) *Worthington v. Grimsditch*, 7 Q. B. 479, E. C. L. R. vol. 53; see, however, *Clark v. Alexander*, 13 L. J. 133, C. P.

(1) If there be mutual running accounts between others than merchants, and any of the items have accrued within the time of the statute, this amounts to an acknowledgment of the previous account, and prevents the operation of the statute. *Fitch v. Hilliary*, 1 Hill, S. C. 292; *Belles v. Belles*, 7 Halst. 339; *Burnet v. Bryan*, 1 Halst. 377; *Chamberlin v. Cuyler*, 9 Wend. 126; *Wood v. Barney*, 2 Verm. 369; *Davis v. Smith*, 4 Greenl. 337; *Abbot v. Keith*, 11 Verm. 525; *Van Swearingen v. Harris*, 1 Watts & Serg. 356; *Thomson v. Hopper*, *Ibid.* 467.

But items in an account charged within six years do not take items charged more than six years before suit out of the statute, unless there are mutual accounts between the parties. *Bennet v. Davis*, 1 N. Hamp. 19; *Kimball v. Brown*, 7 Wend. 322; *Miller v. Colwell*, 2 Southard, 577; *Buntin v. Logow*, 1 Blackford, 373; *Tucker v. Ivers*, 6 Cowen, 193; *Chipman v. Bates*, 5 Vermont, 143; *Gold v. Whitcomb*, 14 Pick. 188; *Blair v. Drew*, 6 N. Hamp. 235; *Smith v. Ruecastle*, 2 Halst. 357.

To constitute mutual accounts, there must be items, within the period limited by statute, on both sides of the account. *Gulick v. Turnpike Co.*, 2 Green, 545.

Where there was an account of hats sold, and a credit of cash paid and one hat returned, it was held that this was not a mutual account. *Hay v. Cramèr*, 2 Watts & Serg. 137; *Lowber v. Smith*, 7 Barr, 381.

Where all the items of an account between the plaintiff and defendant as merchants, bore date more than twenty years antecedent to the commencement of the action, it was held that a small item to the debit of the defendant, dated within twenty years, but at a time when the defendant had ceased to be a merchant, such item not being of a mercantile character, would not revive the whole account against the defendant. *Hancock v. Cook*, 18 Pick. 30.

Payment of interest is sufficient to take the principal out of the statute,^(g) but a payment of principal (except in the case of bills or notes) will not revive a claim for interest.^{(h)(1)}

Secondly, as to the time when the acknowledgment must be made.

Except in the cases which have been mentioned of devises and bequests for the payment of debts, it makes no difference whether the promise, acknowledgment, or payment were made before or after the expiration of six years. An acknowledgment which prevents the running of the statute will also revive a debt already barred.

It was formerly held, that the acknowledgment might be after action brought.⁽ⁱ⁾ But as the acknowledgment is now considered as the ground of action, and the subject of the declaration, the promise, acknowledgment, or payment must clearly be before action brought.^(j)

Payment of money into Court will not take a bill or note out of the statute, except as to the amount paid in.^(k)

Thirdly, as to the person by whom the promise, acknowledgment, or payment may be made.⁽²⁾

(g) *Purdon v. Purdon*, 10 M. & W. 562.*

(h) *Collyer v. Willock*, 4 Bing. 313, E. C. L. R. vol. 13; 12 Moore, 557, S. C.; *Bealy v. Greenslade*, 2 C. & J. 61.*

(i) *Yea v. Fouraker*, 2 Bur. 1099; *Lloyd v. Maund*, 2 T. R. 760; *Rucker v. Hannay*, 4 East, 604, n.

(j) *Tanner v. Smart*, 6 B. & C. 603, E. C. L. R. vol. 13; 9 D. & R. 549, S. C.; *Rew v. Pettet*, 1 Ad. & E. 196, E. C. L. R. vol. 28; 3 N. & M. 456, S. C.; *Bateman v. Pinder*, 3 Q. B. Rep. 574, E. C. L. R. vol. 43.

(k) *Reid v. Dickons*, 5 B. & Ad. 499, E. C. L. R. vol. 27; 2 N. & M. 369, S. C.; and see *Long v. Greville*, 3 B. & C. 10, E. C. L. R. vol. 10; 4 D. & R. 632, S. C.

(1) *Trustees v. Osgood*, 8 Shepl. 176; *Walton v. Robinson*, 5 Iredell, 341; *Sanford v. Hayes*, 19 Conn. 591; *Craig v. Callaway County Court*, 12 Missouri, 94.

(2) The acknowledgment need not be made to the party himself or his agent. *Oliver v. Gray*, 1 Har. & Gill, 204; *Whitney v. Bigelow*, 4 Pick. 110; *St. John v. Garrow*, 4 Porter, 223; *Minkler v. Minkler*, 16 Vermont, 194; *Watkins v. Stevens*, 4 Barbour, S. C. 168; *Carshore v. Huyck*, 6 Ibid. 583.

Contra: *Kyle v. Wells*, 17 Penna. State Rep. 286; *Gillingham v. Gillingham*, Ibid. 302.

Perhaps no cases illustrate better than the two last cited the progress of legal decisions upon the subject of the Statute of Limitations. The time was when this defence was frowned upon by the Courts: the man who resorted to it was presumed to be a dishonest man, who wished to avail himself of the supineness or indulgence of his creditors to defraud them of their property. If sharp practice had succeeded

It may be made by an agent,(1) and therefore by a wife acting as

(1) *Burt v. Palmer*, 5 Esp. 145. But an acknowledgment in writing, signed by an agent, has been held insufficient. *Hyde v. Johnson*, 2 Bing. N. C. 776, E. C. L. R. vol. 29; 3 Scott, 289, S. C. Sed quære. This case, however, has been several times recognized, and a question has even been made whether a written acknowledgment, signed by one of several partners in trade, has any other effect than an acknowledgment by one of several ordinary joint contractors. *Clark v. Alexander*, 13 L. J. 133, C. P.

in obtaining a judgment by default, the Courts did not consider it as within the exercise of a sound and equitable discretion to open the judgment to let in such a defence. Almost any expression referring to the former existence of the claim was allowed to operate as an acknowledgment. If a man admitted the debt, but coupled it with a determination never to pay it, it was held sufficient to go to a jury. Lord Erskine is said to have advised a client, that if applied to on the subject of a demand against which the statute had run, it would be dangerous to remain silent merely, his only safety lay in knocking the claimant down. The opinion of the Supreme Court of Pennsylvania, as delivered by Lowrie, J., presents with great force and succinctness the present evident tendency of the judicial mind, though it may be the courts of other States do not practically go the same length, especially when the overruling of former cases is involved. "The highest morality of a judicial or other public officer," says Judge Lowrie, "consists in keeping himself within and yet fully performing the law of his office, because that is the rule of official duty. But the private citizen is not thus restricted, for the law falls far short of being the rule of individual duty.

"There is a boundary of honor and even of honesty, however undefined, beyond which the law has no jurisdiction; there are duties which it cannot and many others which it should not enforce. And it is well that it is so; for where duty is compelled, it is performed without merit, and that is a base-born morality that is begotten by statute. In order that a man may improve he must have ability to do wrong as well as right, and his nature is violated and his development stunted, when the machinery of the law is too often applied to give form to his actions.

"When a claim is barred by the Statute of Limitations, it ceases to be a legal right, and becomes a mere moral right. The duty is not discharged; but the remedy is transferred from the forum of law to the forum of conscience. But because in some hard cases this latter forum refused relief, the law was stretched and the province of morality invaded by deciding that a moral duty, followed by a promise, became a legal duty; and now such is the law, though the reasoning is inconsequential."

The Judge then proceeds to apply to the case the maxim of the Roman law—*per extraneam personam nihil acquiri nobis potest*. If the defendant had expressly told the witness that he would call and pay, this would have been but the expression of a determination, revocable at pleasure, and would have created no legal duty.

It is, however, the distinct and unequivocal admission of a debt at that time subsisting in full force, with knowledge of the lapse of time, that constitutes the difficulty of the case. If the declaration to a third person admitted that it had been kept alive by renewed promises to the creditor himself, it could not consistently with the well-settled rules of evidence be held unavailable. Both the cases in which this

[*282] agent,^(m) and by one partner even after dissolution *of the partnership,⁽ⁿ⁾ if he makes a payment. But if an agent exceed his authority in making the payment, it will not take the debt out of the statute.^(o)(1)

(m) Evidence of admissions by an agent may be admissible without calling the agent. *Paethorpe v. Furnish*, 2 Esp. 511; *Anderson v. Sanderson*, 2 Stark, 204, E. C. L. R. vol. 3; *Holt*, N. P. C. 591, S. C.; *Gregory v. Parker*, 1 Camp. 394; but see *Gibson v. Baghott*, 5 C. & P. 211, E. C. L. R. vol. 24.

(n) *Wood v. Braddick*, 1 Taunt. 104.

(o) *Linsell v. Bonsor*, 2 Bing. N. C., 241, E. C. L. R. vol. 29; 2 Scott, 399, S. C.

new principle has been advanced, were cases however in which the bar of the statute was already complete at the time of the alleged acknowledgment, and it may be questioned whether the same court would apply the rule to a case where the time had not yet run out.

(1) The acknowledgment by one of several joint debtors is sufficient to take the case out of the statute as to them all. *Getchell v. Heald*, 7 Greenl. 26; *White v. Hale*, 3 Pick. 291; *Bound v. Lathrop*, 4 Conn. 336; *Shepley v. Waterhouse*, 9 Shepl. 497; *Clark v. Sigourney*, 17 Conn. 511.

Contra: *Coit v. Tracy*, 8 Conn. 268; 9 Ibid. 1.

An acknowledgment by one partner after the dissolution binds the other partner. *Patterson v. Choate*, 7 Wend. 441; *Smith v. Ludlow*, 6 Johns. 267; *Austin v. Bostwick*, 9 Conn. 408; *Wheelock v. Doolittle*, 18 Vermont, 440.

Contra: *Bell v. Morrison*, 1 Peters, 351; *Searight v. Craighead*, 1 Penna. Rep. 135; *Brewster v. Hardeman*, *Dudley*, Geo. 138; *Steel v. Jennings*, 1 McMullan, 297; *Mun v. Donaldson*, 2 Humph. 166; *Van Kewen v. Parmelee*, 2 Comstock, 523.

If a promise or acknowledgment by one partner after dissolution, is made before the bar of the statute has attached, it will keep the debt alive as to all, but such promise or acknowledgment will not revive a debt once barred. *Brewster v. Hardeman*, *Dudley*, Geo. 138; *Fellows v. Guimann*, Ibid. 100; *McIntire v. Oliver*, 2 Hawks, 209; *Walton v. Robinson*, 5 Iredell, 341.

An acknowledgment by principal is good as against the surety. *Frye v. Barker*, 4 Pick. 382; *Zent v. Hart*, 8 Barr, 337.

Contra: *Lowther v. Chappell*, 8 Alabama, 353.

A partial payment by one of two joint makers does not take the case out of the statute as to the other. *Hathaway v. Haskell*, 9 Pick. 42; *Coleman v. Forbes*, 22 Penna. State Rep. 156.

Contra: *Joslyn v. Smith*, 13 Vermont, 353; *Real Estate Bank v. Hartfield*, 5 Pike, 551; *Davis v. Coleman*, 7 Iredell, 424; *Patch v. King*, 29 Maine, 448; *Caldwell v. Sigourney*, 19 Conn. 37; *Turner v. Ross*, 1 Rhode Island, 88.

A partial payment, by one of two obligors of a joint and several bond, will not take the case out of the statute as against the other obligor, unless such payment be made while their joint liability continues. *Disborough v. Bidleman*, 1 Spencer, 275; *Zent v. Hart*, 8 Barr, 337; *Lane v. Doty*, 4 Barb. S. C. 530; *Biscoe v. Jenkins*, 5 English, 108.

Payment in part by indorser will not keep the claim alive against the maker. *Bibb v. Peyton*, 11 Smedes & Marshall, 275.

The 9 Geo. 4, c. 14, introduces, as we have seen, a distinction between acknowledgments and promises *by words only*,^(p) and payments. The former, in the case of joint contracts, affect only the party acknowledging; the latter retain their former effect.

Where there is a joint contract, the parties are respectively agents for each other in respect of that contract, till the joint liability determines.^(q) In a joint action, therefore, against the makers of a joint and several promissory note, a *payment* by one will revive the debt against the others.^(r) So, if the action be brought against one alone, *payment* by his companion will bind the defendant,^(s) though made fraudulently.^(t) And it makes no difference that the statute had run out, when the payment by the other joint contractor was made.^(u) But, after the joint liability has determined by the death of one of the parties, payment by the survivor will not take the note out of the statute against the executors of the deceased;^(v) nor will a payment by the executor of the deceased affect the survivor.^(w) And it has been held, that nothing short of an express promise will take a debt out of the statute against an executor.^(x) And if the plaintiff rely on a *payment*, it must distinctly appear that the payment was made by the executor in his representative, and not in his personal capacity.^(y) And it seems that *payment* by one executor will not of itself take the case out of the statute as against his coexecutor.^(z) When one of two makers of a joint and several note made his companion his executor and died, and the survivor afterwards paid interest on the note out of his own pocket, this being an acknowledgment in

(p) See *Emery v. Day*, 1 C. M. & R. 249; * 4 Tyr. 695, S. C.

(q) *Wood v. Braddick*, 1 Taunt. 104. Though made by a partner after a dissolution of partnership. *Goddard v. Ingram*, 12 L. J. 9, Q. B.; 3 Q. B. Rep. 839, E. C. L. R. vol. 43, S. C.

(r) *Perham v. Raynal*, 2 Bing. 306, E. C. L. R. vol. 9; 9 Moore, 556, S. C.

(s) *Whitcomb v. Whiting*, Doug. 629, overruling *Bland v. Haselrig*, 2 Vent. 151; *Barleigh v. Scott*, 8 B. & C. 36, E. C. L. R. vol. 15; 2 M. & R. 93, S. C.; 9 L. J. Ex. 1.

(t) *Goddard v. Ingram*, 3 Q. B. Rep. 839, E. C. L. R. vol. 43; 12 L. J., Q. B. 9, S. C.

(u) *Channell v. Ditchburn*, 5 N. & W. 494; 9 L. J. Ex. 1, S. C.

(v) *Atkins v. Tredgold*, 2 B. & C. 23, E. C. L. R. vol. 9; 3 D. & R. 200, S. C.

(w) *Slater v. Lawson*, 1 B. & Ad. 396, E. C. L. R. vol. 20.

(x) *Tulloch v. Dunn*, 1 R. & M. 416.

(y) *Scholey v. Walton*, 12 M. & W. 510; * see, however, *Griffin v. Ashby*, 2 Car. & K. 139, E. C. L. R. vol. 61.

(z) *Ibid.*

his personal, and not in his representative *capacity, was held [*283] not to revive the debt as against the executors.(a) But the executors of the deceased are bound, if the payment were made by the survivor before the death of their testator.(b) It has been held, that payment of a dividend under a commission against one of two makers of a joint and several note will take the note out of the statute against the solvent maker.(c)

So, where a joint note was made by a man and a woman, and the woman afterwards married, and a joint action was brought against husband and wife and the other maker, laying the promise by the other maker and the woman *dum sola*, and the defendants pleaded that the action did not accrue within six years, evidence of a promise by the other maker after the marriage was held to be out of the issue.(d)

Fourthly, as to the person to whom the acknowledgment, promise, or payment must be.

(a) *Atkins v. Tredgold*, 2 B. & C. 23, E. C. L. R. vol. 9; 3 D. & Ry. 200, S. C.

(b) *Burleigh v. Stott*, 8 B. & C. 36, E. C. L. R. vol. 15; 2 M. & Ry. 93, S. C.

(c) *Jackson v. Fairbank*, 2 Hen. Bla. 340, recognized in *Perham v. Raynal*, 2 Bing. 306, E. C. L. R. vol. 9; 9 Moore, 556, S. C.; but see *Brandram v. Wharton*, 1 B. & Ald. 463.

(d) *Pittam v. Foster*, 1 B. & C. 248, E. C. L. R. vol. 8; 2 D. & Ry. 363, S. C. When a single woman gives a promissory note and marries, and the note is more than six years old, there are great difficulties in suing, although acknowledgments and payments have been made within six years, but after marriage. A husband can only be sued for the debt of his wife *dum sola* during coverture: Com. Dig. Baron and Feme, 2, C.; and therefore a promise *by him* to pay would extend his liability, and is void unless upon a new consideration. *Mitchinson v. Hewson*, 7 T. R. 348. An acknowledgment or payment, therefore, by the husband, would not suffice. An acknowledgment or promise by the husband and wife, or by the wife alone, could have no operation, the wife being incompetent to contract. *Morris v. Norfolk*, 1 Taunt. 212. If the husband's promise were considered as a promise to pay during coverture, it would still extend his liability, for an action for not paying during coverture would lie after the coverture. If as a promise to pay, provided judgment be recovered during coverture (for the judgment fixes the husband with the debt, Com. Dig. Baron and Feme, 2, B.), it would still be subject to these exceptions: first, there would be no cause of action till judgment recovered, which is absurd; secondly, the judgment in such an action, being against the husband alone, would charge him to a greater extent than a judgment against husband and wife; for, on a joint judgment, if the husband survive, real execution would be against his wife's lands as well as his; and if the wife survive, personal execution would, it is conceived, survive against her, and real execution would still be joint, whereas on a judgment against the husband alone, he is subject, notwithstanding his pre-decease, to personal execution, and has no contribution in real execution.

It has been held, that the acknowledgment or promise need not, in point of fact, be made to the plaintiff, but may be made to a stranger. *(e)* (1) Therefore, a letter by one joint and several *maker of a promissory note to another, has been decided to take the note [*284] out of the statute as against the writer; *(f)* and from the cases above cited, it should seem it would, before the 9 Geo. 4, c. 14, have had the same effect as against the other maker to whom it was addressed. So also, in an action by indorsees against acceptors of a bill, a deed between the acceptors and third persons, reciting that the bill was outstanding and unpaid, was held to take it out of the statute. *(g)* So an acknowledgment to a prior holder of a bill or note, enures to the benefit of a subsequent holder. *(h)* So a payment to an administrator, under void letters of administration, will take a note out of the statute in an action by an administrator under valid letters. *(i)*

Lastly, as to the evidence by which a promise, acknowledgment, or payment must be proved, in order to its taking a debt out of the statute.

Where the same debt is secured by different instruments, payment of interest on one will take the others out of the statute. *(j)*

The statute requires that an acknowledgment or promise *by words only* should be in writing, signed by the party chargeable. *(k)*

A promise or payment cannot be proved by verbal acknowledgment. *(l)* But it has been held, that the appropriation of the payment to a particular debt may be. *(m)*

(e) Peters v. Brown, 4 Esp. 46. As to payment to an agent of the holder, see Megginson v. Harper, 2 C. & Mees. 322; * 4 Tyr. 94, S. C.

(f) Halliday v. Ward, 3 Camp. 32.

(g) Mountstephen v. Brooke, 1 B. & Ald. 224.

(h) Gale v. Capern, 1 Ad. & Ell. 102, E. C. L. R. vol. 28; 3 N. & M. 863, S. C.; see, however, Cripps v. Davis, 12 M. & W. 159.*

(i) Clark v. Hooper, 10 Bing. 480, E. C. L. R. vol. 25; 4 Moore & S. 353, S. C.

(j) Dowling v. Ford, 11 M. & W. 329.*

(k) See ante, 281, note *(l)*.

(l) Willis v. Newham, 3 Y. & J. 518; * Baildon v. Walton, 1 Exch. Rep. 632; * Waters v. Tompkins, 2 C. M. & R. 723; * 1 Tyr. & Gr. 137, S. C.; Bayley v. Ashton, 4 P. & D. 204; Maghee v. O'Neil, 7 M. & W. 531; * see, however, Eastwood v. Saville, 9 M. & W. 615.*

(m) Waters v. Tompkins, ubi supra; Bevan v. Gething, 3 Q. B. Rep. 740, E. C. L. R. vol. 43; Baildon v. Walton, 1 Ex. Rep. 632.*

(1) See ante, p. 281, second note (2).

This part of the statute is retrospective, and therefore a verbal acknowledgment or promise, though made before 1st January, 1829, when the statute came into operation, is inadmissible in evidence.(n)

[*285] *Entries on the bill, of payment, of interest, or principal, in the handwriting of the plaintiff, were formerly evidence to take the debt out of the statute; but now the 9 Geo. 4, c. 14, s. 3, enacts, that no indorsement or memorandum of any payment, written or made after the first January, 1829, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the statute. It may now, therefore, be advisable that any indorsement of payment of interest, or part payment of principal, should be written by the debtor and signed by both parties; signed by the creditor, as evidence in favor of the debtor; written and signed by the debtor, to keep the security alive in favor of the creditor.

Indorsements of the payment of interest, are presumed to have been written at the time they bear date.(o)

The statute 9 Geo. 4, c. 14, s. 8, exempts the agreement or memorandum made necessary by that act from stamp duty;(p) but if the agreement amount to a promissory note, it must be stamped.(q)

Eighthly, as to the mode in which the statute is to be taken advantage of.

A public act need not in general, before the recent alterations of the law,(r) have been pleaded. But to this rule (except in an action of ejectment), the Statute of Limitations, 21 Jac. 1, c. 16, was an exception. It was once held that the statute need not be pleaded where it appeared on the face of the declaration that the plaintiff was too late.(s) But it was afterwards settled, that it must, even in that case, be pleaded; for peradventure the plaintiff may be within one of the saving clauses.(t)

(n) *Towler v. Chatterton*, 6 Bing. 258, E. C. L. R. vol. 19; 3 M. & P. 619, S. C.; *Hilliard v. Lenard*, Moo. & M. 297. (o) *Smith v. Battens*, 1 M. & Rob. 341.

(p) See *Morris v. Dixon*, 4 Ad. & E. 845, E. C. L. R. vol. 31; 4 N. & M. 438, S. C. (q) *Jones v. Ryder*, 4 M. & W. 32.*

(r) R. H. T. 4, W. 4.

(s) *Brown v. Hancock*, Cro. Car. 115.

(t) *Hawkings v. Billhead*, Cro. Car. 404; *Puckle v. Moor*, 1 Vent. 191; *Lee v. Rogers*, 1 Lev. 110; *Gould v. Johnson*, 2 Ld. Raym. 838.

It must now be pleaded in all cases.

There are two modes of pleading the Statute of Limitations: "*That the defendant did not undertake within six years,*"—"that the action did not accrue within six years."^(u)

*Wherever the contract is executory, the former plea is [*286] bad.^(v)

The latter form is the safest and best plea in all actions, whether on contracts or for wrongs.^(w)

To a plea of set-off, the Statute of Limitations must be replied specially.^(x)

A replication of the statute admits all the facts alleged in the plea, and only raises the question whether the cause of set-off accrued to the defendant within six years.^(y) Thus, where the defendant pleaded that the plaintiff had given his promissory note to C., that C. was dead, and that P. was C.'s administrator, who had before the action indorsed the note to the defendant, and the plaintiff replied that the cause of set-off had not accrued to the defendant within six years, it was held that all the facts stated in the plea were admitted.^(z)

A replication in assumpsit to a plea of the statute must be consistent with the promises laid in the declaration. For example, if the original promise were absolute, the promise laid in the replication must not be conditional.^(a)

The plaintiff may reply to a plea of the statute, that he is within the saving clause, as that he was abroad at the time when the action

^(u) Before the Uniformity of Process Act, the plaintiff might (except in actions by original) at his election, have treated either the writ or the bill as the commencement of the suit, and, therefore, might have pleaded that the action did not accrue within six years before the exhibiting of the bill, or before the commencement of the suit, and the latter is the proper mode of pleading now.

A writ should not be replied specially, but given in evidence. *Dickenson v. Teague*, 1 C. M. & R. 241.*

^(v) *Gould v. Johnson*, 2 Salk. 422; 2 Ld. Raym. 838, S. C.

^(w) 1 Saund. 33, f.

^(x) *Chapple v. Durston*, 1 C. & J. 1.*

^(y) *Gale v. Capern*, 1 Ad. & Ell. 102, E. C. L. R. vol. 28; 3 N. & M. 863, S. C.

^(z) *Ibid.*

^(a) *Tanner v. Smart*, 6 B. & C. 606, E. C. L. R. vol. 13; 9 D. & Ry. 849, S. C.; *Haydon v. Williams*, 7 Bing. 168, E. C. L. R. vol. 20; 4 M. & P. 811, S. C.

accrued, and six years have not elapsed since his return—that he was an infant, &c.

It is doubtful whether fraud in the defendant be a good replication to a plea of the statute.(b)

Lastly, independent of the statute, if a note be twenty years old,(c) it will have been presumed to have been paid, in the absence of circumstances tending to repel the presumption.(d)

The lapse of thirteen years has been held sufficient to raise a presumption of the repayment of a loan not secured by a note.(e)

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*CHAPTER XXVII.

OF THE LAW OF SET-OFF AND MUTUAL CREDIT IN RELATION
TO BILLS AND NOTES.

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COMPENSATIO, in the Roman law, corresponds with set-off in the English law; but the provisions in the civil law, for setting one demand

(b) *Clark v. Hougham*, 2 B. & C. 149, E. C. L. R. vol. 9; 3 D. & R. 322, S. C.; *Ex parte Bolton*, 1 Mont. & Ayr. 60.

(c) Such, for two hundred years, has been the common law as to a bond. The defence was introduced into Ireland by statute 8 Geo. 1, c. 4, and into England by the 3 & 4 Wm. 4, c. 42, s. 3.

(d) *Duffield v. Creed*, 5 Esp. 52.

(e) *Cooper v. Turner*, 2 Stark. 497, E. C. L. R. vol. 3.

against another, are more liberal and extensive than in ours. Compensation is defined by the civilians, *DEBITI ET CREDITI INTER SE CONTRIBUTIO*.^(a)

Set-off signifies the subtraction, or taking away of one demand from another opposite or cross demand, so as to extinguish the smaller demand, and reduce the greater by the amount of the less, or if the opposite demands are equal, to extinguish both. It was also, formerly, sometimes called stoppage, because the amount sought to be set-off was *stopped*, or deducted from the cross demand.

Set-off is in all cases useful to prevent circuity of action; but where one of the parties is dead, insolvent, bankrupt, or removed beyond the jurisdiction of the English Courts, it is absolutely necessary, to prevent injustice.

*Yet it should seem that set-off is unknown to the common law, perhaps, because it was thought very inconvenient to try [*288] two cross demands in a single action, and because, in the early stages of our jurisprudence and commerce, its necessity was not so apparent. Some writers have, indeed, held, that there is such a thing as a set-off by action at common law;^(b) but it is conceived that the authorities cited in support of this doctrine are cases rather of conditional contract, or of payment, than of set-off. It is true that Lord Mansfield says,^(c) that "where the nature of the transaction consists in a variety of receipts and payments, the law allows the balance only to be the debt;" but that is, because the entries on each side of an account current are mutual payments rather than mutual cross demands.

But though the practice of set-off was unknown to Courts of law before the statutes, it was recognized in Courts of equity long before; and the want of it at law was found productive of great injustice. "The natural sense of mankind," says Lord Mansfield, "was first shocked at this doctrine in the case of bankrupts; they thought it hard that a person should be bound to pay the whole that he owed to a bankrupt, and receive only a dividend of what the bankrupt owed him."

This defect, therefore, was supplied in the case of bankruptcy, by

(a) Dig. 16, 2, 1.

(b) Montague on Set-off, pp. 1 and 2.

(c) *Green v. Farmer*, 1 Black, 651; 4 Bur. 2214, S. C.

the statute 4 Anne, c. 17.(d) Afterwards by the statutes of Geo. 2, the same equitable provision was made for the set-off of debts generally in the Courts of law, and especially after the death of one of the parties. Then the Lords' Act, and the Acts for the Relief of Insolvent Debtors, adopted the same provision; and, lastly, the Courts of law, anxious to do justice at the termination, as well as at the commencement of a suit, in the exercise of their equitable jurisdiction over their respective suitors, have allowed the set-off of costs and judgments.

In examining the subject of set-off and mutual credit in its relation to negotiable instruments, let us consider, first, the provision of the general statute of set-off; secondly, of the Bankrupt Act, and the Acts for the Relief of Insolvent Debtors; and thirdly, the doctrine of the Courts of equity. The fourth branch of the subject, I mean the set-off of costs and judgments in the different Courts, is, perhaps, foreign to the design *of this Treatise; but it may [*289] be proper to notice, lastly, a few cases, in which a stipulation, though not properly the subject of a set-off, is yet held to be a bar to the action.

First, the general statutes of set-off are, the 2 Geo. 2, c. 22, s. 13, and the 8 Geo. 2, c. 24, s. 4. These statutes only give a set-off in case of mutual debts; that is, of ascertained money demands.(e)

Hence, it follows, that there can be no set-off unless the demand for which the action is brought, and the counter demand sought to be set off, are both of them for specific sums of money; and, therefore, there can be no set-off at all to an action in form *ex delicto*, as *trover*, nor to an action *ex contractu*, unless for a liquidated sum. Therefore, also, a guarantee cannot be set off.(f)(1)

. (d) *Green v. Farmer*, 1 Black, 651; 4 Bur. 2214, S. C.

(e) Though secured by a penalty, 8 Geo. 2, c. 24, s. 5. See *Collins v. Collins*, 2 Bur. 820; *Lee v. Lester*, 7 C. B. Rep. 1008, E. C. L. R. vol. 62.

(f) *Crawford v. Stirling*, 4 Esp. 207; *Morley v. Inglis*, 4 Bing. N. C. 58, E. C. L. R. vol. 33; 5 Scott, 314, S. C.

(1) In an action for damages for negligence in keeping the plaintiff's sheep, founded upon a special written contract, the defendant will not be permitted to deduct from the damages the compensation which he claims for keeping the sheep. Such compensation, if any be due, must be sought in a distinct action. *Crowninshield v. Robinson*, 1 Mason, 93. So no set-off is admissible in an action on an open policy of insurance, although the demand be for a total loss, as the damages

The subject of set-off must be a legal, and not a mere equitable debt; and, therefore, the assignee of a bond cannot set off the amount secured by that instrument,^(g) but the indorser or assignee of a bill or note may set it off, because negotiable instruments are assignable at law.⁽¹⁾

(g) *Wake v. Tinkler*, 16 East, 36.

are uncertain and unliquidated. *Gordon v. Bowne*, 2 Johns. 150. But premium notes may be deducted under an express stipulation in the policy to that effect. *Cleveland v. Clap*, 5 Mass. 201; *Dodge v. Union Marine Ins. Co.*, 17 Ibid. 471. In an action for the recovery of damages for the breach of a warranty in the sale of goods, defendant is not entitled to a set-off of demands against the plaintiff. *Wilmot v. Hurd*, 11 Wendell, 584. See also, *Dowd v. Fawcett*, 4 Devereux, 92; *George v. Cahawba Railroad Co.*, 8 Alabama, 234.

An unliquidated demand cannot be pleaded in set-off. *De Tastett v. Croussilat*, 2 Wash. C. C. 132; *State v. Welsted*, 6 Halsted, 397; *Hepburn v. Hoag*, 6 Conn. 613; *McCord v. Williams*, 2 Alabama, 71; *Woodruff v. Laffin*, 4 Pike, 527; *Thomas v. McConnell*, 3 McLean, 81; *Whitaker v. Robinson*, 8 Smedes & Marshall, 349; *Hawks v. Lands*, 3 Gilman, 227; *Smith v. Smith*, 1 Smith, 337; *Crenshaw v. Jackson*, 6 Georgia, 509.

Damages resulting from the breach of a contract are unliquidated where there is no criterion provided by the parties, or by the law operating on the contract, by which to ascertain the amount of the damages. *McCord v. Williams*, 2 Alabama, 71.

It is a general rule that where *indebitatus assumpsit* will lie upon a simple contract, the debt due thereon may be pleaded in set-off. *Austin v. Feland*, 8 Missouri, 309.

A debtor draws and delivers to his creditor an order on a third person payable at sight, and directs the amount, when received, to be placed to the credit of his account. The creditor, without the knowledge or assent of the drawer, takes the drawee's acceptance payable at sixty days, and before the expiration thereof the acceptor dies insolvent. Held, that the drawer's claim against his creditor on account of the draft was a claim for unliquidated and uncertain damages, for the failure to collect it, and could not be allowed as a set-off in a suit brought by the creditor to recover the original demand against the drawer. *Harrison v. Wortham*, 8 Leigh, 296.

But unliquidated damages may be set off, under the plea of payment, in an action arising from the same transaction. It is admitted in such cases rather as an equitable defence than in strictness a set-off. *Hubler v. Tamney*, 5 Watts, 51; *Gogel v. Jacoby*, 5 Serg. & Rawle, 117; *Henion v. Morton*, 2 Ashmead, 150; *Abercrombie v. Owings*, 2 Richardson, 127; *Turnpike Co. v. Harris*, 8 Humphrey, 558; *Elliot v. Heath*, 14 N. Hamp. 131.

In Pennsylvania, however, an unliquidated cross demand, arising from a distinct and independent contract, may be set off. *Ellmaker v. Franklin Fire Ins. Co.*, 6 Watts & Serg. 439; *Phillips v. Lawrence*, Ibid. 150.

So also in Illinois. *Edwards v. Todd*, 1 Scam. 462; *Kaskaskia Bridge Co. v. Shannon*, 1 Gilman, 15.

(1) *Wheeler v. Raymond*, 5 Cowen, 231; 9 Ibid. 295; *Gilchrist v. Leonard*,

It must be a subsisting legal debt; therefore, a debt barred by the Statute of Limitations cannot be set off.(h)(1) So a debt, satisfied in contemplation of law by the discharge of a debtor out of execution, cannot be set-off.(i) But the defendant may set off a debt due to him, though he have obtained a verdict against the plaintiff in a former action,(j) or a judgment, or though he have even taken him in execution, if the debtor has not been discharged.(k) But the debt to be set off need not necessarily be one for which an action could be brought. Therefore an unsigned attorney's bill may be set off.(l) And the debt must exist not only at the commencement of the action but at the time of plea pleaded, and the plea must aver that the plaintiff still is indebted to the defendant.(m)

[*290] The demand must have been a debt, strictly so called; that is, *a debt actually due and payable at the commencement of the action.(n) Therefore, a bill or note cannot be set off unless due, and in the defendant's hands before the issuing of the writ.(o)

And it must be a debt still due at the time of trial. Therefore it may be replied that since the plea the plaintiff has paid the debt.(p)(2)

(h) Bul. N. P. 180.

(i) Jacques v. Withy, 1 T. R. 557.

(j) Baskerville v. Brown, 2 Bur. 1229.

(k) Peacock v. Jeffery, 1 Taunt. 426.

(l) Harrison v. Turner, 16 L. J. 295, Q. B.; 10 Q. B. Rep. 482, E. C. L. R. vol. 59, S. C.

(m) Dendy v. Powell, 3 Mees. & W. 442.*

(n) Richards v. James, 2 Exch. Rep. 471.*

(o) Evans v. Prosser, 3 Term R. 186; and see Braithwaite v. Coleman, 4 Nev. & Man. 654, E. C. L. R. vol. 30.

(p) Eyton v. Littledale, 18 L. J. 369, Exch.; 4 Exch. Rep. 159,* S. C.; Briscoe v. Hill, 10 M. & W. 735.*

2 Bailey, 135; Bell v. Horton, 1 Alabama, 413; Carew v. Northrup, 5 Ibid. 367; Smith v. Taylor, 9 Ibid. 633; Bowen v. Snell, 11 Ibid. 379.

In those states, however, in which there is no separate administration of equity, but the principles of equity are adopted and enforced through common law forms, as in Pennsylvania, a different rule of necessity prevails. Murray v. Williamson, 3 Binney, 135; Morgan v. Bank of North America, 8 Serg. & Rawle, 88; Bessley v. Crawford, 19 Ohio, 126.

(1) Gilchrist v. Williams, 3 Marshall, 235; Williams v. Gilchrist, 3 Bibb, 49; Turnbull v. Strohecker, 4 McCord, 210; Crist v. Garner, 2 Penna. Rep. 251; Madden v. Madden, 2 Rep. Const. Court, 350; Jacks v. Moore, 1 Yeates, 391.

(2) The debt must be existing between the parties at the commencement of plaintiff's suit. Jefferson County Bank v. Chapman, 19 Johns. 322; Carpenter v. Butterfield, 3 Johns. Cas. 145; Huling v. Hugg, 1 Watts & Serg. 418; Cox v.

The debts must be mutual; for the statutes only authorize the setting off of mutual debts.

Therefore, in the case of partnership debts, if the firm sue, only a debt due from all the partners can be set-off. So, if the firm be sued, they cannot set off a debt due to one or more of the partners, but not to all.^(q) But one partner may settle a debt due to the firm, by setting off against it a debt due from himself,^(r) and though, as it seems, he should in so doing be acting in fraud of his copartners.

^(q) But the Roman law was otherwise; one partner might claim a set-off due to his partner, "*ex causa societatis*." Dig. 45, 2, 10; Cujacus in Cod. 4, 31, 9.

^(r) Wallace v. Kelsall, 7 M. & W. 264.*

Cooper, 3 Alabama, 256; Carfrew v. Canavan, 4 Howard, Miss. 370; Kelly v. Garrett, 1 Gilman, 649; Johnson v. Comstock, 6 Hill, 10; Whitaker v. Turnbull, 3 Harrison, 172; Varney v. Brewster, 14 N. Hamp. 49; Edwards v. Temple, 2 Harrington, 322.

A permission to the defendants to use a bill as a set-off, and to be liable to the owner only in the event of his being able to set it off, is not such a property in the bill, as makes it the subject of set-off. Adams v. McGrew, 2 Alabama, 675; McDonald v. Harrison, 12 Missouri, 447.

Where a note, not negotiable, was assigned for a valuable consideration, and an action was brought for the benefit of the assignee in the name of the payee, it was held that the maker might set-off a debt due to him at the time of the assignment. Sanborn v. Little, 3 N. Hamp. 539.

The defendant sued by the assignee of a note cannot set-off a claim against the assignor, unless he shows that he held it at the time of the notice of the assignment. Ritchie v. Moore, 5 Munford, 388; Stewart v. Anderson, 6 Cranch, 203.

In case of mutual demands existing at the death of a decedent, they may be set off in an action by the executor or administrator. Bordman v. Smith, 4 Pick. 212. Light v. Lieninger, 8 Barr, 403.

In an action by an administrator for a debt due to his intestate, the defendant cannot set off a debt due from the intestate, purchased by the defendant after the death of the intestate. Root v. Taylor, 20 Johns. 137.

A debt due from an intestate in his lifetime, cannot be set off against one which has accrued to the administrator since the death of the intestate. Wolfersberger v. Bucher, 10 Serg. & Rawle, 10; Colby v. Colby, 2 N. Hamp. 419; Fry v. Evans, 8 Wendell, 530; Mills v. Lumpkin, 1 Kelly, 511.

In suits by or against executors or administrators, when the estate is insolvent, a debt not due at the time of the death of the testator or intestate, although it became due before the commencement of the suit, cannot be set off. It is otherwise if the estate be solvent; in that case it makes no difference that the debt proposed to be set off was not due at the time of the death of the testator or intestate, if it were due when the suit was commenced. Bosler v. Exchange Bank, 4 Barr, 32. See Rawson v. Copland, 3 Barbour, Ch. Rep. 166; Ray v. Dennis, 5 Georgia, 357.

There cannot be a set-off against a set-off. Ulrich v. Berger, 4 Watts & Serg. 19; Hudnall v. Scott, 2 Alabama, 569; Gable v. Parry, 13 Penna. State Rep. 181.

• The debts and credits of a firm survive at law to the surviving partner, and a Court of law will not take notice of his equitable claims and liabilities. His separate debts and credits, and his debts and credits as representative of the firm, are considered as of the same nature, and may, therefore, be set off against one another. Thus, when a *surviving* partner sues for a partnership debt, a separate debt due from him may be set off. So, when he sues for his separate debt, a debt due from the former partnership may be set off. When he is sued for a partnership debt, he may set off a debt due to him individually. And when he is sued for a separate debt, may set off a debt due to the firm.(s) And if one of two joint contractors is sued alone, he may plead in bar that the promises were made by him and another jointly, and that a set-off is due from the plaintiff to him and his co-contractor.(t)(1)

The indorsee of an overdue note is not liable to the set-off of a debt due from his indorser to the maker.(u)(2)

(s) *Slipper v. Stidstone*, 1 Esp. 47; 5 T. R. 493, S. C.

(t) *Stackwood v. Dunn*, 3 Q. B. Rep. 822, E. C. L. R. vol. 43.

(u) *Burrough v. Moss*, 10 B. & C. 558, E. C. L. R. vol. 21.

(1) A joint debt cannot be set off against a separate debt, nor a separate debt against a joint debt. *McDowell v. Tyson*, 14 Serg. & Rawle, 300; *Porter v. Neker-vis*, 4 Randolph, 359; *Howe v. Sheppard*, 2 Sumner, 409; *Wood v. Carlisle*, 6 N. Hamp. 27; *Henderson v. Lewis*, 9 Serg. & Rawle, 379; *State Bank v. Armstrong*, 4 Devereux, 519; *Vose v. Philbrook*, 3 Story, 335; *Bullard v. Dorsey*, 7 Smedes & Marshall, 9; *Albright v. Aldrich*, 2 Texas, 166; *Burgwin v. Babcock*, 11 Illinois, 28.

One of several defendants who are sued upon a joint note may set off a demand due to himself from the plaintiff, against the demand due upon the joint note. *Powell v. Hogue*, 8 B. Monroe, 443.

Where a note was made payable to one of a firm for partnership property, and passed to a creditor of the firm, to whose use a suit was brought in which set-off was pleaded of individual notes of the payee, held competent to show in answer that the note was by fraud or mistake made payable to one of the firm. *Bourne v. Wooldridge*, 10 B. Monroe, 492.

One of two defendants may set off a debt due to him by the plaintiff, unless there is some superior equity in a third person. *Stewart v. Coulter*, 12 Serg. & Rawle, 252; *Childerson v. Hammond*, 9 Serg. & Rawle, 68. One of several partners sued for a separate debt may set off a debt due by the plaintiff to the firm, provided it appears that the set-off is made with the express assent of the other partners and the plaintiff is insolvent. *Wrenshall v. Cook*, 7 Watts, 464. See *Craig v. Henderson*, 2 Barr, 261.

(2) In what cases set-off is allowed against the indorsee of claims against the maker of a note indorsed after maturity. *Collins v. Allen*, 12 Wendell, 356; *Sargent v. Southgate*, 5 Pick. 312; *Driggs v. Rockwell*, 11 Wendell, 504.

*To examine minutely what are mutual debts, as between principal and agent, as between executors and administrators, and the debtors and creditors of themselves, or of the estate of their testator or intestate,^(v) and as between husband and wife and their debtors and creditors, would be, perhaps, deviating from our main subject.⁽¹⁾

If a note be given to a married woman, the husband may, as we have seen, either sue alone or join his wife. If he sue in his own name, he is not liable to a set-off, due from his wife *dum sola*, but he is to a set-off due from himself.^(w) If he join her, it should seem, he is liable to a set-off due from his wife, but he is not to one due from himself.^(x)⁽²⁾

(v) See *Blakesley v. Smallwood*, 8 Q. B. Rep. 538, E. C. L. R. vol. 55.

(w) *Burrough v. Moss*, 10 B. & C. 558, E. C. L. R. vol. 21. (x) *Ibid.*

(1) *Hurlbut v. Insurance Co.*, 2 Sumner, 471; *McKinney v. Bellows*, 3 Blackford, 31; *Scott v. Rivers*, 1 Stewart & Porter, 19; *Durrock v. Hay*, 2 Yeates, 208; *Morrison v. Furnham*, 1 Marshall, 41; *Waln v. Wilkins*, 4 Yeates, 461; *Gordon v. Bowne*, 2 Johns. 150; *Warner v. Barker*, 3 Wendell, 400; *Pitkin v. Pitkin*, 8 Conn. 325; *Bullard v. Dorsey*, 7 Smedes & Marshall, 9; *Miniffee v. Ball*, 2 English, 520; *Hilliard v. Walker*, 11 Illinois, 644.

A claim against the plaintiff in a representative capacity cannot be set off in a suit brought in an individual capacity. *Grew v. Burditt*, 9 Pick. 265; *Snow v. Conant*, 8 Verm. 308; *Cummings v. Williams*, 5 J. J. Marshall, 384; *Wright v. Rogers*, 3 McLean, 229.

Claims against an agent, known to be such when the contract upon which suit is brought was entered into, cannot be set off against a debt due the principal. *Wilson v. Codman*, 3 Cranch, 193; *Gordon v. Church*, 2 Caines, 299; *Browne v. Robinson*, 2 Caines' Cas. 341; *Foster v. Hoyt*, 2 Johns. Cas. 327; *Carman v. Garrison*, 13 Penna. State Rep. 158.

A claim of a surviving partner is liable to a set-off of his individual debt, unless there be some equitable interest in another, which a court of law can protect. *Lewis v. Culbertson*, 11 Serg. & Rawle, 48; *Meador v. Scott*, 4 Vermont, 26; *Cowder v. Elliott*, 2 Missouri, 60; *Holbrook v. Lackey*, 13 Metcalf, 132.

In an action upon a promissory note against principal and surety, a demand due from the plaintiff to the principal may be set off. *Mahurin v. Pearson*, 8 N. Hamp. 539; *Harrison v. Henderson*, 4 Georgia, 198; *Contra*, *Woodruff v. State*, 2 English, 333.

So in an action against the surety alone, such set-off may be made with the assent of the principal. *Lynch v. Bragg*, 13 Alabama, 773.

(2) Where a suit has been brought by husband and wife for the rent of premises belonging to the wife, the tenant may set off a demand against the husband alone. *Ferguson v. Lothrop*, 15 Wendell, 625; *Wishart v. Downey*, 15 Serg. & Rawle, 77.

In an action by husband and wife for a legacy left to the wife "for her own use," a debt due from the husband to the testator cannot be set off. *Jamison v. Brady*, 6 Serg. & Rawle, 466. The debt of the husband cannot be set off after divorce, though the wife's claim accrued during coverture. *Fink v. Hake*, 6 Watts, 131.

The general statutes of set-off are permissive, not imperative. Therefore, if a defendant have a cross demand, he may either set it off, or bring a cross action for it, at his option.(y)(1)

And he may (supposing his demand to be greater than the demand against which he sets it off) plead his set-off and bring an action at the same time for the same sum. If he has a verdict in the action where he is plaintiff, and also a verdict on his plea of set-off in the action where he is defendant, he must consent to reduce his verdict in the action where he is plaintiff, by the amount to which he has made his set-off available in the action where he is defendant.(z)

A discharge under the Insolvent Debtors' Act must be replied specially.(a)

Under the informal replication that the plaintiff never was indebted, he cannot prove payment, as he might under the common replication that he was not, nor is, indebted.(b)

If a defendant does not deliver particulars of set-off in compliance with a Judge's order, he is precluded from giving evidence of it at the trial.(c)

Secondly, Set-off under the Bankrupt Act.

Set-off in bankruptcy was first given by the 4th Anne, c. 17, s. 11, re-enacted by 5 Geo. 2, c. 38. These statutes enact, that the [*292] mutual credit must have been before the bankruptcy; *and, therefore, it was decided, where a debtor to the estate claimed to set off notes of the bankrupt, that it was for him to show that he took the notes before the act of bankruptcy.(d) The 46 Geo. 3, c.

(y) *Baskerville v. Browne*, 2 Bur. 1229.

(z) *Ibid*.

(a) *Ford v. Dornford*, 8 Q. B. Rep. 583, E. C. L. R. vol. 55.

(b) *Stockbridge v. Sussams*, 3 Q. B. Rep. 239, E. C. L. R. vol. 43.

(c) *Ibbett v. Leaver*, 16 M. & W. 770; * *Young v. Geiger*, 18 L. J. C. P. 43; 6 C. B. Rep. 552, E. C. L. R. vol. 60, S. C.

(d) *Marsh v. Chambers*, 2 Stra. 1234; *Dickson v. Evans*, 6 T. R. 57; *Oughterlony v. Easterby*, 4 Taunt. 88; *Moore v. Wright*, 6 Taunt. 517, E. C. L. R. vol. 1; 2 Marsh. 209, S. C.

(1) The law does not apply mutual debts in extinguishment of each other. *Carmalt v. Post*, 8 Watts, 410; *Post v. Carmalt*, 2 Watts & Serg. 70; *Ulrich v. Berger*, 4 *Ibid*. 19; *Morton v. Bailey*, 1 Scam. 213.

A set-off is in the nature of a cross-action, and may be withdrawn in analogy to suffering a nonsuit, where the evidence is found to be too weak to support it; but like a nonsuit, the withdrawal of it ought to be explicit. *Muirhead v. Fitzpatrick*, 5 Watts & Serg. 506.

135, s. 3, enacted, that one debt or demand might be set off against another, notwithstanding a prior act of bankruptcy, provided the credit were given to the bankrupt two months before the date of the commission, and provided the person claiming the set-off had no notice of an act of bankruptcy, or that the bankrupt was insolvent, or had stopped payment. The 6 Geo. 4, c. 16, s. 50 (repealed, but re-enacted by the 12 & 13 Vict. c. 106, s. 171), goes still further, and allows all debts to be set-off, whether contracted before or after the act of bankruptcy, provided no notice of a specific act of bankruptcy can be brought home to the debtor. In case, therefore, of a country banking-house stopping payment, there does not now seem any necessary legal objection to the set-off by the debtors of the firm, of notes bought up by them in the interval between the stopping payment and issuing of the commission. If, indeed, when the doors and windows of a bank are closed, the bankers either withdraw from the bank, or shut themselves up in it, and so avoid any communication with their creditors, they commit an act of bankruptcy by *keeping house or absenting themselves*, with intent to defeat their creditors.^(e) But if on stopping payment and closing the bank, they are, from illness, unable to be seen, or the creditors are referred to them at their banking-house, or at their private houses, the mere circumstance of stopping payment is not an act of bankruptcy; and notes taken by a debtor to the firm, after knowledge that the firm had stopped payment, may be set off.^(f) Notice of acts of bankruptcy by some members of a banking firm, without notice of an act of bankruptcy by another member, will take away the right to set-off.^(g) But a man cannot buy up and set off notes and bills, known by him to have been given by the bankrupts for the accommodation of other persons.^(h)

A debtor to the bankrupt's estate cannot set off a bill or note transferred to him by the real owner, even before the bankruptcy, for the mere purpose of being set off against a demand by the bankrupt's estate, so that the real owner might *receive 20s. in the pound.⁽ⁱ⁾ For in such a case the debtor is a mere trustee for [*293]

(e) *Cumming v. Bailey*, 6 Bing. 363, E. C. L. R. vol. 19; 4 Moo. & P. 36, S. C.

(f) *Hawkins v. Whitten*, 10 B. & C. 217, E. C. L. R. vol. 21; 5 Man. & R. 219, S. C.; *Dickson v. Cass*, 1 B. & Ad. 343, E. C. L. R. vol. 20.

(g) *Dickson v. Cass*, 1 B. & Ad. 343, E. C. L. R. vol. 20; and see *Craven v. Edmondson*, 6 Bing. 734; 4 Moo. & P. 622, S. C.

(h) *Ex parte Stone*, 1 G. & J. 191.

(i) *Fair v. McIver*, 16 East, 130; *Lackington v. Combes*, 6 Bing. N. Ca. 71, E. C. L. R. vol. 37; 8 Scott, 312, S. C.

others, and having no real cross-demand of his own against the estate, cannot be allowed to set off another man's.(j) But if the notes were handed over to the debtor to the estate for an antecedent debt due to him from the owner of the notes, they may be set off.(k) Mere legal debts, without any beneficial interest in the creditor, may be set off under the general statutes of set-off, but not under the mutual credit clause. "The object of the mutual credit clause," says Parke, B., "is to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate."(l)

Nor can the assignees of the bankrupt deprive a man of a set-off, once existing.(m)

We have seen, that the general statutes of set-off only authorize a set-off of mutual *debts*; but the bankrupt act authorizes the set-off of a mutual *credit*, as well as of a mutual debt.

It has been decided that the term mutual credit is more comprehensive than the expression *mutual debts*.

In the first place, it has been held, that credit need not necessarily be of money. Therefore, where a trader, being indebted to a packer on a note of hand, sent him certain goods to pack, the trader having become bankrupt, Lord Hardwicke thought that the packer was entitled to set off against the price of the goods, not only the charge for packing, but the money due on the note.(n) This decision, however, goes further than any other, and was qualified very soon after by the same learned person.(o) The law is now taken to be, that, in order to set off goods, the property must have been deposited with an authority to turn it into money; in other words, the mutual credit must be such as was intended to terminate in a debt.(p) Therefore, it has been held, that where, in consideration of the bankrupt's acceptance, defendant promised to indorse a bill to the bankrupt, such

(j) Forster v. Wilson, 12 M. & W. 191.* (k) Ibid. (l) Ibid.

(m) Edmeads v. Newman, 1 B. & C. 418, E. C. L. R. vol. 8; Bolland v. Nash, 8 B. & C. 105, E. C. L. R. vol. 15.

(n) Ex parte Deeze, 1 Atk. 228.

(o) Ex parte Ockenden, 1 Atk. 235.

(p) Glennie v. Edmunds, 4 Taunt. 775; Rose v. Hart, 8 Taunt. 499, E. C. L. R. vol. 4; 2 Moo. 547, S. C.; Easum v. Cato, 5 B. & Ald. 861, E. C. L. R. vol. 7; 1 Dowl. & R. 530; Russell v. Bell, 8 M. & W. 277.* A mere liability is insufficient, 5 Bing. N. Ca. 578, E. C. L. R. vol. 35.

promise was not a subject of mutual *credit.(q) And the mutual credit must have actually existed between the bankrupt himself and the other party.(r)

There may be mutual credit, though one of the debts constituting it be not due; as if it be a bond, bill, or note payable at a future day.(s)

An acceptance of the bankrupt's may be set off as an ingredient in mutual credit, notwithstanding that it was not due at the time of the bankruptcy, and was in the hands of an indorsee.(t)

And where a bill is indorsed, credit may be deemed to be given to the indorser as well as to the acceptor, and therefore if the indorser become bankrupt, the indorsement may be an ingredient in mutual credit.(u) A bill accepted for the accommodation of the bankrupt is within the mutual credit clause,(v) and may, *under that clause*, be set off against a demand by the assignees for money had and received to *their* use after the bankruptcy.(w)

It is not necessary to constitute mutual credit, that the parties both intend there should be mutual credit; it is sufficient though one take, by indorsement from a third party, the note or acceptance of another without his knowledge.(x)

But where goods or bills are deposited with a direction to turn them into money and apply the proceeds in a particular manner, if the party receiving the property is guilty of a breach of trust, he cannot claim the benefit of a set-off under this section.(y)

(q) *Rose v. Sims*, 1 B. & Ad. 521, E. C. L. R. vol. 20; but see *Gibson v. Bell*, 1 Bing. N. C. 743, E. C. L. R. vol. 27; 1 Scott, 712, S. C.

(r) *Young v. Bank of Bengal*, 1 Moore's Priv. Co. Ca. 150.

(s) *Ex parte Prescott*, 1 Atk. 230; *Atkinson v. Elliott*, 7 T. R. 378.

(t) *Collins v. Jones*, 10 B. & C. 777, E. C. L. R. vol. 21; *Bolland v. Nash*, 8 B. & C. 105, E. C. L. R. vol. 15; 2 Man. & R. 189, S. C.; *Russell v. Bell*, 8 M. & W. 277.*

(u) *Alsager v. Currie*, 12 M. & W. 755;* and see *Starey v. Burns*, 7 East, 435; see *Young v. Bank of Bengal*, 1 Moore's Priv. Council Cases, 150.

(v) *Smith v. Hodson*, 4 T. Rep. 211; *Ex parte Bayle*, Cooke's Bkt. Law, 542; *Ex parte Wagstaff*, 13 Vesey, 65; *Bittleston v. Timmis*, 14 L. J. 117, C. P.; 1 C. B. Rep. 389, E. C. L. R. vol. 50, S. C.

(w) *Bittleston v. Timmis*, and see *Hulme v. Muggleston*, 3 Mees. & W. 30.* The mistake in the marginal note of that case is corrected in *Bittleston v. Timmis*, ubi supra.

(x) *Hankey v. Smith*, 3 T. R. 507.

(y) *Key v. Flint*, 8 Taunt. 21, E. C. L. R. vol. 4; 1 Moo. 451, S. C.; *Ex parte Flint*, 1 Swanst. 30; *Buchanan v. Findlay*, 9 B. & C. 738, E. C. L. R. vol. 17; 4 M. & Ry. 53, S. C.

But mutual credit will not destroy a lien created by express contract. *C. held M.'s acceptance for 24*l.*, and sent M. an article [*295] to be repaired by him. It was agreed that C. should pay M. the amount of the repairs in ready money. Before the repairs were completed M. became bankrupt. Held, that C. could not, by virtue of his cross-demand on the acceptance, sue M.'s assignees in trover for the article before paying the amount of the repairs.(z)

Set-off in bankruptcy may be either in an action at law, or before the commissioners.

A set-off under the Bankruptcy Act is available in all actions, whether for debt or damages. No plea or notice was formerly necessary, though it was usual to plead or give notice as under the general statutes. But now by R. H. 4 Wm. 4, mutual credit must be pleaded. Where the assignees affirm the bankrupt's dealings, they let in his set-off.(a) An assignment under the old Insolvent Debtors' Act had no relation back to the commencement of the imprisonment, and therefore the assignees having declared on a sale by the insolvent, after the imprisonment, and before the assignment, not on a sale by themselves, were subject to the defendant's set-off against the insolvent.(b)

To an action for a debt due to the assignees in their official character, the defendant cannot plead a set-off due from the bankrupt before his bankruptcy.(c) But such a set-off may be the subject of mutual credit.(d)

Thirdly, Set-off in equity.

The jurisdiction of Courts of equity in set-off does not depend on the statute law; it existed before any act of Parliament on the subject; and has, since the statutes, been exercised in cases which they will not reach.

Thus, where A. S. directed her bankers to invest a sum of money in the public funds, which they led her to believe they had done, when, in fact, they had not, A. S. afterwards joining her brother, J.

(z) *Clarke v. Fell*, 4 B. & Ad. 404, E. C. L. R. vol. 24; 1 Nev. & Man. 244, S. C.

(a) *Smith v. Hodson*, 4 T. R. 211.

(b) *Sims v. Simpson*, 1 Bing. N. C. 306, E. C. L. R. vol. 27.

(c) *Groom v. Mealey*, 2 Bing. N. C. 138, E. C. L. R. vol. 29; 2 Scott, 171, S. C.; *Wood v. Smith*, 4 M. & W. 522.*

(d) See *Bittleston v. Timmis*, *supra*.

S., in a joint and several note to the bankers for money advanced by them to J. S., and the bankers failing, Lord Eldon directed the sum due to A. S. to be set off^(e) against the demand in a suit by the assignees against J. S.

Equity will not relieve a party who has neglected to plead a set-off at law.^(f) But, perhaps, if the set-off were *a mere equitable demand, not available at law, equity would assist.^(g) [*296]

There are cases in which a stipulation between the parties, though not the subject of a set-off, is a bar to the action.

A release is, as we have seen, a discharge of the action, whether, at the date of the release, the bill were due or not. And a covenant not to sue at all is equivalent to a release. So, a release upon condition, or a general covenant not to sue upon condition, are each of them, after condition performed, a good defence. But a covenant not to sue for a certain time,^(h) is neither an absolute discharge of the action, for that was not the intention of the parties, nor a suspension of it; because it is a rule of law, that a personal action, once suspended by the act of the parties, is gone forever.

In general, where an instrument is not the subject of a set-off, it can only bar the action by operating as a release. So that, if not under seal, it has no effect in barring the action, and no effect at all if made without consideration.

But, in favor of commerce, this rule has been relaxed in the case of bills. We have seen, that an express renunciation by the holder of his claim on the acceptor, has been held a bar to an action by the holder against the acceptor. So, it has been decided, that an absolute or conditional simple agreement between parties to a bill, that a party liable shall not be sued, operates as a defeasance or release. And it has been decided, that an indemnity has the same effect.⁽ⁱ⁾

(e) *Ex parte Stephens*, 11 Ves. 24; and see *Ex parte Hansom*, 12 Ves. 346.

(f) *Ex parte Ross*, Buck. 127.

(g) *Townrow v. Benson*, 3 Mad. 203.

(h) *Ayliff v. Scrimshire*, 1 Show. 46; ante, 186.

(i) *Carr v. Stephens*, 9 B. & C. 758, E. C. L. R. vol. 17; 4 Man. & R. 590, S. C.

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*CHAPTER XXVIII.

OF A LOST BILL OR NOTE.

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THOUGH the finder of a lost bill or note acquires no property in it, so as, on the one hand, to enable him to defend an action of trover brought by the rightful owner, or on the other, to sue the acceptor or maker, yet we have already seen, that if the finder transfer a lost bill or note, which may pass by delivery, his transferee, provided he took it without fraud, is entitled both to retain the instrument against the loser, and to compel payment from the parties liable thereon.

Let us now inquire what steps the loser should take. And, in the first place, it is settled, that, if bills or notes be lost or stolen out of letters put into the post-office, no action lies against the Postmaster-General. "The case of the postmaster," says Lord Mansfield, "is in no circumstance whatever similar to that of a common carrier; but he is like all other public officers, such as the Lords Commissioners of the Treasury, the Commissioners of the Customs and Excise, the Auditors of the Exchequer, &c.; who were never thought liable for any negligence or misconduct of the inferior officers, in their several departments."(a) But a deputy postmaster is liable for neglect in not duly delivering letters.(b)(1)

(a) *Whitfield v. Lord Le Despencer*, Cowp. 754; *Lane v. Cotton*, 1 Salk. 17.

(b) *Rowning v. Child*, 3 Wils. 443; 2 Bla. Rep. 906; 5 Burr. 2716; *Hordern v. Dalton*, 1 C. & C. 181, E. C. L. R. vol. 12.

(1) *Maxwell v. McIlroy*, 2 Bibb. 211; *Franklin v. Low*, 1 Johns. 396; *Dunlop v. Munroe*, 7 Cranch, 242; *Bolan v. Williamson*, 2 Bay, 551; S. C. 1 Brevard, 181; *Bishop v. Williamson*, 2 Fairfield, 495; *Schroyer v. Lynch*, 8 Watts, 453; *Teall v. Felton*, 3 Barbour, S. C. 512; S. C. 1 Comstock, 537.

*It is advisable that the loser should immediately give notice of the loss to the parties liable on the bill; for they will thereby be prevented from taking it up without due inquiry.^[*298] Public advertisement of the loss should also be given; for, if any person whosoever discounts it with notice of the loss, that will be such strong evidence of fraud that he can acquire no property in it.^(c)

(c) A public notification of the loss is not only advisable to prevent the transfer of lost or stolen bills or notes into the hands of bona fide holders, but there are cases in which it was formerly considered essential to the plaintiff's right to recover of those who might have taken the instrument. See the observations of Best, C. J., in *Snow v. Peacock*, 3 Bing. 411, E. C. L. R. vol. 11; 11 Moo. 286, S. C. The law formerly was, that if a man took a lost bill or note negligently, he acquired no title against the rightful owner; but if the loser had neglected to publish his loss, and the receiver took the note, not dishonestly, but negligently, then the negligence of the loser equalled the negligence of the receiver, and *potior erat conditio possidentis*. *Snow v. Peacock*, 3 Bing. 411, E. C. L. R. vol. 11; 11 Moo. 284; *Strange v. Wigney*, 6 Bing. 677, E. C. L. R. vol. 19; 4 M. & P. 470, S. C. Thus, where the plaintiff was robbed of his pocket-book, containing an indorsed bill, and then advertised the pocket-book, saying nothing of the bill, but on the contrary, stating in the advertisement that the contents of the pocket-book were of no use to any but the owner, the Court of C. P. held that he was not entitled to recover against a negligent receiver; for that his notice that the contents of the pocket-book were of no use to any but the owner, tended rather to mislead than to assist parties to whom the bill might be offered. *Beckwith v. Corral*, 3 Bing. 444, E. C. L. R. vol. 11. If due notice had been given of the loss, then, though the receiver took the instrument bona fide and without suspicion, yet if he failed to exercise proper care and caution, as if he discounted or changed a bill or note of considerable amount for a stranger, without inquiry, he must have refunded. *Gill v. Cubitt*, 3 B. & C. 466, E. C. L. R. vol. 10; 5 Dowl. & R. 324; *Strange v. Wigney*, 6 Bing. 677, E. C. L. R. vol. 19; 4 Moo. & P. 470, S. C. But the law on this subject is now entirely changed. See the Chapter on *Transfer*, and the observations of Lord Denman in *Bartrum v. Caddy*, 9 Ad. & E. 286, E. C. L. R. vol. 36; 1 Per. & Dev. 207, S. C. The plaintiff went to a public meeting in London with more than 500*l.* in his pocket, and entertaining some apprehension of the company in which he found himself, kept his hand on his pocket, but notwithstanding that precaution, was robbed, and among other property lost a Bank of England note for 200*l.*, payable to bearer. He advertised his loss in the newspapers. Nearly two years afterwards, this note was traced to the possession of the defendant, who received it, as he said, in payment of a debt on the Derby stakes, but could not recollect from whom. The plaintiff sued him in

(1) Held not to be necessary to entitle the owner to maintain an action to recover the contents of a lost note. *Dormady v. State Bank*, 2 Scam. 236.

It is proper for the loser to give immediate notice to the parties, and to publish notice of the loss; but public notice, not brought home to the buyer, will not affect his title; nor will the failure to give public notice preclude the owner from showing by other proof that the buyer took the note *mala fide*. *Matthews v. Poythress*, 4 Georgia, 287.

We have already seen that, if the bill be transferable only by indorsement, a forgery can convey no title, and a payment *by [*299] the acceptor, or other party, to a man claiming under the forged indorsement, will not exonerate him.

The party who has lost or destroyed a bill must, nevertheless, make application to the drawee for payment at the time it is due; and give notice of dishonor, for the bill might still have been paid with or without an indemnity, and the prior parties, by not having been advised of the dishonor, may have been prevented from pressing their respective remedies against parties liable to them.(d)(1)

There are three cases in which a plaintiff cannot produce a bill: it may be in the defendant's hands; it may be destroyed; or it may be lost.

If it be in the defendant's hands, the plaintiff may give him notice to produce; and, if the defendant will not do so, the plaintiff may give secondary evidence of its contents.(e)

So, if it can be proved that the instrument has been destroyed, secondary evidence of its contents has been held admissible. "If a bill be proved to be destroyed," says Lord Ellenborough, "I should feel no difficulty in receiving evidence of its contents, and directing the jury to find for the plaintiff. Even on a trial for forgery, the destruction of the instrument charged by the indictment to be forged, is no bar to the proceedings. I remember a case before Mr. J. Buller, where the prisoner had destroyed a bank note he was accused of

trover, and the Court held the negligence of the plaintiff not connected with the defendant's conduct, could not be set up as an answer to his claim, and that the defendant had not exercised due caution in taking the note. *Easley v. Crockford*, 10 Bing. 243, E. C. L. R. vol. 25; 3 M. & Scott, 700, S. C.; see *Snow v. Saddler*, 3 Bing. 610, E. C. L. R. vol. 11; 11 Moo. 506, S. C. The caution required of a person discounting was held to increase with the amount. See ante, Chapter on *Transfer*.

(d) *Thackray v. Blackett*, 3 Camp. 164.

(e) *Smith v. McClure*, 5 East, 477; 2 *Smith*, 443, S. C.

(1) *Hinsdale v. Miles*, 5 Conn. 331. The fact that a bill is lost is an excuse for delay in making a demand upon the drawee, but for no more than reasonable delay. *Aborn v. Bosworth*, 1 Rhode Island, 401.

In order to charge the indorser of a lost promissory note, the owner must tender an indemnity to him and the maker at the time of demand and notice. *Smith v. Rockwell*, 2 Hill, 482.

having forged, by swallowing it; and the learned Judge who presided held, that he might have been convicted without the production of the bank note; and this doctrine was approved of by the whole profession.”(f) But it should seem, from the judgment of the Court of King’s Bench, in a recent case, that this doctrine is now overruled, and that the owner of a *destroyed* bill or note, if negotiable, cannot, *at law*, recover against the other parties.(g)(1)

And it seems now clear that, if a bill, note, or check, negotiable either by indorsement or by delivery only,(h) be *lost*, no action will lie for the loser against any one of the *parties to the instru-[*300] ment, either on the bill or note itself, or on the consideration. “Upon the question,” says Lord Tenterden, “whether an action can be brought on a lost bill, the opinions of the judges, as they are to be found in the cases, have not been uniform, and cannot be reconciled to each other. Amid conflicting opinions, the proper course is to revert to the principle of these actions on bills of exchange. The custom of merchants is, that the holder of a bill shall present the instrument at its maturity, to the acceptor, demand payment of its amount, and, upon the receipt of the money, deliver up the bill. The acceptor, paying the bill, has a right to the possession of the instrument for his own security, and for his voucher and discharge *pro tanto*, in his account with the drawer. As far as regards his

(f) *Pierson v. Hutchinson*, 2 Camp. 211; 6 Esp. 126, S. C.

(g) *Hansard v. Robinson*, 7 B. & C. 90, E. C. L. R. vol. 14; 9 Dowl. & R. 860, S. C. But see *Woodford v. Whiteley*, Moo. & M. 517, and *Wain v. Bailey*, 10 Ad. & E. 616, E. C. L. R. vol. 37; 2 Per. & Dav. 507, S. C.; see *Price v. Price*, 16 M. & W. 243; * *Ramuz v. Crowe*, 1 Exch. Rep. 172.*

(h) *Bevan v. Hill*, 2 Camp. 381.

(1) A recovery cannot be had on a note merely lost and not destroyed, if it had been indorsed before it was lost. *Pintard v. Tackington*, 10 Johns. 104; *Baker v. Dumbolton*, Ibid. 240; *Rogers v. Miller*, 4 Scam. 333.

Contra: If the payee had not indorsed it. *Depew v. Wheelan*, 6 Blackford, 485; *Whitesides v. Wallace*, 2 Speers, 194; *Dean v. Speakman*, 7 Blackford, 317; *Branch Bank v. Tillman*, 12 Alabama, 214.

The holder of a negotiable promissory note in an action against the maker is not required to give direct and positive evidence of its destruction, where he has not produced the note on trial, although such note is overdue. It is sufficient if he give such proof as shows that the defendant cannot afterwards be compelled to pay the amount to a bona fide holder. *Swift v. Stephens*, 8 Conn. 431.

That an action at law may be maintained upon a negotiable bill or note proved to be destroyed, see *Rowley v. Ball*, 3 Cowen, 303.

voucher and discharge towards the drawer, *it will be the same thing whether the instrument has been destroyed or mislaid.* With respect to his own security against a demand by another holder, there may be a difference. But how is he to be assured of the fact, either of the loss or destruction of the bill? Is he to rely upon the assertion of the holder, or to defend an action at the peril of costs? And, if the bill should afterwards appear, and a suit be brought against him by another holder, a fact not absolutely improbable in the case of a lost bill, is he to seek for witnesses to prove the loss, and to prove that the new plaintiff must have obtained it after it became due? We think the custom of merchants does not authorize us to say that this is the law."

But, if a bill or note, not negotiable, be lost, it is conceived that an action will lie, either on the bill or on the consideration.⁽ⁱ⁾ Where a bill made or became payable to bearer is lost, the acceptor, or other parties, are not liable, though the bill was lost after it was due, or after a promise to pay by the acceptor. "If," says Lord Tenterden, "upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer, and retain his money?"^{(k)(1)}

(i) *Wain v. Bailey*, 10 Ad. & E. 16, E. C. L. R. vol. 37; *Price v. Price*, 16 M. & W. 243; * *Ramuz v. Crowe*, 1 Exch. Rep. 174; * *Hansard v. Robinson*, 7 B. & C. 90, E. C. L. R. vol. 14; 9 Dowl. & R. 860, S. C.; but see *Woodford v. Whiteley*, Moo. & M. 517; *Bevan v. Hill*, 2 Camp. 381; see, however, *Ramuz v. Crowe*, 1 Exch. Rep. 172; * *Long v. Bailie*, 2 Camp. 214, n.; *Champion v. Terry*, 3 B. & B. 295, E. C. L. R. vol. 7; 7 Moo. 130, S. C.; *Rolt v. Watson*, 4 Bing. 273, E. C. L. R. vol. 13; 12 Moore, 510, S. C.

(k) *Hansard v. Robinson*, 7 B. & C. 95, E. C. L. R. vol. 14; *Davis v. Dodd*, 4 Taunt. 602.

(1) When the existence, amount, and loss of promissory notes are shown, and it does not appear that they were negotiable, the plaintiff is entitled to recover on the lost notes. *McNair v. Gilbert*, 3 Wendell, 344; *Pintard v. Tuckington*, 10 Johns. 104; *Hough v. Barton*, 20 Vermont, 455.

A recovery can be had at law upon a note lost after it fell due; if it was lost before due, the remedy is, it seems, in Chancery, where the owner can be required to indemnify the maker. *Thayer v. King*, 15 Ohio. 242.

If the note is alleged to be lost, the defendant has a right to show that the note was passed by the payee by delivery without assignment. *Buston v. Dees*, 4 Yerger, 4.

A plaintiff cannot give evidence of a lost promissory note, without first proving its loss, so as to repel an inference of fraudulent design in the loss or destruction. *Blade v. Noland*, 12 Wendell, 173.

If a negotiable note, indorsed in blank by the payee, be lost by the indorser, and

The defence that the bill is lost must, in the superior Courts, *be raised by plea, otherwise the plaintiffs may recover by [*301] producing the ordinary secondary evidence.(l)

If a bill is lost after action brought, and defendant suffer judgment by default, the Court will, on a copy verified by affidavit, refer it to the Master to see what is due.(m) But if, in such a case, the defendant resist the action, and puts the plaintiff to prove the bill, the loss may be no excuse for the non-production of it.(n)(1)

A man who takes half a note takes it necessarily under suspicious circumstances,(o) and cannot recover to the injury of the maker. But, where the holder sued on the half of a 5*l.* note, the other half having been stolen from the Leeds Mail, Lord Ellenborough said, "Payment can be enforced at law only by the production of an entire note, or by proof that the instrument, or the part of it which is wanting, has been actually destroyed. The half of this note, taken from the Leeds mail, may have immediately got into the hands of a bona fide holder for value; and he would have had as good a right of suit upon that as the plaintiff has upon this. But the maker of a promissory note cannot be liable, in respect of it, to two parties at the same time."(p) It is doubtful how far the argument, from the liability of the maker on the second half, would be held valid at this day.

If a lost bill or note be in the hands of a party who has no right to retain it, as if, for example, it be still in the possession of the finder, or of a transferee, who has taken it from him under circum-

(l) *Blackie v. Pidding*, 6 C. B. Rep. 196, E. C. L. R. vol. 60.

(m) *Brown v. Messiter*, 3 M. & Sel. 281; *Allen v. Miller*, 1 Dowl. 420; *Clarke v. Quince*, 3 Dowl. 26; *Flight v. Browne*, 2 Tyr. 312.

(n) *Poole v. Smith*, Holt, N. P. Rep. 144.

(o) *Bayley*, 6th ed. 379.

(p) *Mayor v. Johnson*, 3 Camp. 324; *Mossop v. Eaden*, 16 Ves. 436.

he afterwards assigns to another his right thereto, the assignee cannot maintain an action at law in his own name upon such lost note. *Willis v. Crescy*, 5 Shepley, 9.

The payee of a promissory note, not under seal, which is lost, may maintain assumpsit for the amount, but must aver a consideration. *Stephens v. Crostwait*, 3 Bibb, 222.

(1) In an action on a note which is lost, it is not necessary to declare on the note as lost. If such note is lost after the suit is commenced, evidence may be given of its contents. *Viles v. Moulton*, 11 Vermont, 470; *Vanawken v. Hornbeck*, 2 Green, 178; *Easton v. Friday*, 2 Richardson, 427.

stances amounting to fraud, the true owner may bring an action of trover; or, if it have been paid by the acceptor or maker to such wrongful holder, the amount is recoverable in action for money had and received.^(g) And we have seen that, if the maker or acceptor pay it improperly, it will not be allowed him in account with the payee or drawer.

But, where no action lies on the lost bill, or on the consideration, as, where the bill has been indorsed in blank, and where no action can be brought against the wrongful holder, *either in trover [^{*302}] or assumpsit, the loser is not absolutely without remedy; he may then resort to a Court of equity for relief.

The 9 & 10 Wm. 3, c. 17, s. 3, enacts, that "in case any such inland bill shall happen to be lost or miscarried within the time before limited for the payment of the same, then the drawer of the said bill is and shall be obliged to give another bill of the same tenor with that first given; the person to whom they are delivered giving security, if demanded, to the drawer to indemnify him against all persons whatsoever, in case the said bills, so alleged to be lost or miscarried, shall be found again."^(r)

This provision is not peculiar to the law of England, but agreeable to the mercantile law of other countries.^(s)

Notwithstanding some authorities to the contrary,^(t) it is now clearly settled that a Court of common law has no jurisdiction under this statute; a Court of law not being able to enforce the giving of a new bill, or qualified to judge of the sufficiency of an indemnity.^(u)

On the other hand, the relief administered by Courts of equity is not confined within the letter of the statute. It will be afforded not only on such bills as are mentioned in the statute, but on others; not only before they are due, but after; not only on bills, but on notes; not only against the drawer, but against the indorser, or the accep-

(g) *Down v. Halling*, 4 B. & C. 330, E. C. L. R. vol. 10; 6 D. & Ry. 455; 2 C. & P. 11, S. C.; *Lovell v. Martin*, 4 Taunt. 799.

(r) The 3 & 4 Anne, c. 9, extends, as it seems, this enactment to promissory notes.

(s) Code de Commerce, Liv. 1, tit. 9, art. 151, 152; Ordonnance de Commerce de Louis XIV, tit. 5, art. 19.

(t) *Walmsley v. Child*, 1 Ves. sen. 346; *Hart v. King*, 12 Mod. 309; *Holt*, 118 S. C.

(u) *Ex parte Greenway*, 6 Ves. 812; *Davies v. Dodd*, 4 Price, 176; *Toulmin v. Price*, 5 Ves. 238; *Bromley v. Holland*, 7 Ves. 19, 20, 249.

tor; not only may a new bill be required, but payment.(v) But the Court will not call on a party to renew or pay a lost bill, without providing him with a satisfactory indemnity. To a suit in equity by the last indorsee of a lost bill against the acceptor, the prior indorsers need not be made parties.(w)(1)

Where a debtor remits his creditor a bill or note, by a conveyance which the creditor directs, or by post, if that be the ordinary vehicle of transmission, and the bill or note be lost or stolen, the loss will fall on the party to whom the bill was intended to be remitted.(x)

*CHAPTER XXIX.

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HOW FAR A BILL OR NOTE IS CONSIDERED AS PAYMENT.

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THOUGH it be a general rule of law, that one simple contract cannot be extinguished by another similar executory contract,(a) for

(v) *Walmsley v. Child*, 1 Ves. sen. 346; *Powell v. Monnier*, 1 Atk. 611; *Toulmin v. Price*, 5 Ves. 238; *Ex parte Greenway*, 6 Ves. 812; *Mossop v. Eaden*, 16 Ves. 430; *Hansard v. Robinson*, 7 B. & C. 90, E. C. L. R. vol. 14; 9 Dowl. & R. 860, S. C.; *Davis v. Dodd*, 4 Taunt. 602. (w) *Macartney v. Graham*, 2 Sim. 285.

(x) *Warwick v. Noakes*, Peake, 67.

(a) But see *Com. Dig. Accord. B.*; *Good v. Cheesman*, 2 B. & Ad. 328, E. C. L. R. vol. 22; 4 C. & P. 513, S. C.; *Cartwright v. Cook*, 3 B. & Ad. 701, E. C. L. R. vol. 23; *Garrard v. Woolner*, 8 Bing. 258, E. C. L. R. vol. 21; 1 M. & Sc. 327, S. C.; *Carter v. Wormald*, 1 Exch. Rep. 81.*

(1) In a suit in equity to recover on a lost promissory note, the complainant may be required, by decree of the court, to indemnify the defendant by bond and security against all claims on the note, and may be authorized to recover on compliance therewith and on payment of costs. *Burrows v. Goodhue*, 1 Iowa, 48.

that is merely substituting one cause of action for another, yet the delivery of a valid bill or note suspends the creditor's remedy for a debt, and if he either receive the money on the instrument, or be guilty of laches, it operates as a complete satisfaction. (b) "The law," says Lord Kenyon, "is clear, that if, in payment of a debt, the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt, until such bill or note becomes payable, and default is made in the payment; but, if a bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawer's in his hands, and who, therefore, refuses it, in such case he may consider it as waste paper, [*304] and resort to the original demand, and sue the *debtor on it." (c) The taking a bill or note amounts to an agreement to give the debtor credit for the time it has to run. (1)

(b) 3 & 4 Anne, c. 9, s. 7; *Sibree v. Tripp*, 15 L. J., Exch. 318; 15 M. & W. 23,* S. C.

(c) *Stedmand v. Gooch*, 1 Esp. 3; *Kearslake v. Morgan*, 5 T. R. 513. An unsatisfied judgment on the bill alone will not destroy the original debt. *Tarleton v. Allhusen*, 2 Ad. & Ell. 32, E. C. L. R. vol. 29.

(1) *Okie v. Spencer*, 2 Wharton, 253; *Contra*, *Weakley v. Bell*, 9 Watts, 273.

A bill or note is not satisfaction of a pre-existing debt unless it be so agreed; or the debtor is injured by the laches of the creditor who receives it. *Hoar v. Clute*, 15 Johns. 224; *Woodcock v. Bennet*, 1 Cowen, 711; *Denniston v. Imbrie*, 3 Wash. C. C. 396; *Dougal v. Cowles*, 5 Day, 511; *Hart v. Boller*, 15 Serg. & Rawle, 162; *McGinn v. Holmes*, 2 Watts, 121; *Chartain v. Cox*, 2 Bailey, 574; *Bill v. Porter*, 9 Conn. 28; *Gardner v. Gorham*, 1 Douglass, 507; *Weed v. Snow*, 3 McLean, 265; *Hay v. Stone*, 7 Hill, 128; *Kelsey v. Rosborough*, 2 Richardson, 241; *McConnell v. Stettinius*, 2 Gilman, 707; *Steamboat v. Hammond*, 9 Missouri, 59; *Morgan v. Bitzenberger*, 3 Gill, 350; *Elwood v. Deifendorf*, 5 Barbour, S. C. 398; *Gordon v. Price*, 10 Iredell, 385; *Smith v. Smith*, 7 Foster, 244; *Thompson v. Briggs*, 8 Foster, 40.

Aliter, if it is accepted as payment. *Abercrombie v. Manly*, 9 Porter, 145; *Slocumb v. Holmes*, 1 Howard (Miss.), 139; *Cave v. Hall*, 5 Missouri, 59; *Watson v. Owens*, 1 Richardson, 111; *Mims v. McDowell*, 3 Georgia, 182.

And not then, if it was the party's own note, and not the note of a third person. *Cole v. Lachett*, 1 Hill, 516; *Waydell v. Law*, 6 Hill, 448; *Elwood v. Deifendorf*, 5 Barbour, S. C. 398.

In Maine and Massachusetts, it is presumed to have been intended as payment. *Descadillas v. Harris*, 8 Greenl. 298; *Wallace v. Agry*, 4 Mason, 343; *Cornwall v. Gould*, 4 Pick. 444. See *Hutchins v. Olcutt*, 4 Vermont, 555; *Costar v. Davies*, 3 English, 213.

A creditor taking a note which he indorses and gets discounted, but is afterwards obliged to pay, has not received payment thereby of an antecedent debt. *Kean v. Dufresne*, 3 Serg. & Rawle, 233.

It is not essential to plead the taking of a negotiable instrument, either as payment, or as satisfaction. In answer to an action for a debt, it is sufficient to allege that a bill or note payable to order or bearer, was delivered for and on account of the sum due, *(d)* and that the bill or note has been or is running, or that it is in the hands of a third person. *(e)* But a plea is not double, which alleges both that the bill was taken for and on account, and also in payment. *(f)* But the liberty of pleading that a bill or note was given or taken *on account* is confined to the case of negotiable instruments. It must appear on the face of the plea that the bill or note was payable to order or to bearer, otherwise the plea is bad, even after verdict. *(g)*

The taking a bill or note from a party bound by a contract under seal, does not extinguish or suspend the remedy on the specialty, unless the bill or note is actually paid. Thus, where one of three joint covenantors gave a bill of exchange for a part of a debt secured by the covenant, it was held that the bill only operated as a collateral security, not affecting the remedy on the covenant, and even though judgment had been obtained on the bill, Le Blanc, J., observing, "The giving of another security, which, in itself, would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the fruit of a judgment." *(h)*

Where a tenant gave a note of hand for arrears of rent, it was

(d) Kearslake v. Morgan, 5 T. R. 513; see Griffiths v. Owen, 13 M. & W. 58.*

(e) Price v. Price, 16 M. & W. 232;* but see Mercer v. Cheese, 12 L. J. 56, C. P.; 4 M. & G. 804, E. C. L. R. vol. 43, S. C.; Crisp v. Griffiths, 2 C. M. & R. 159.*

(f) Maillard v. Duke of Argyle, 6 M. & G. 40, E. C. L. R. vol. 46. And an allegation that a bill was given "on account of and in *payment and discharge*," is not equivalent to an allegation that it was given in satisfaction. McDowall v. Boyd, 17 L. J., Q. B. 295.

(g) James v. Williams, 13 M. & W. 828.*

(h) Drake v. Mitchell, 3 East, 251; and see Curtis v. Rush, 2 Ves. & B. 416.

If the bill or note of a third person is transferred for a debt contracted at the time, the presumption is that it is received in satisfaction; but if for a precedent debt, then that it is received as collateral security merely: but in either case the presumption may be rebutted. Bayard v. Shunk, 1 Watts & Serg. 92.

The taking of such note raises a presumption that a settlement is then made of all outstanding accounts between the parties, but this is a presumption which may be rebutted by other presumptions, or by other facts and circumstances. Butts v. Dean, 2 Metcalf, 76; Hsley v. Jewett, Ibid. 168; Maynard v. Johnson, 4 Alabama, 116.

held, that the landlord might nevertheless distrain, for the note was no alteration of the debt till after payment.(i)(1)

[*305] *The Attorneys' and Solicitors' Act, 6 & 7 Vict. c. 73, s. 21, enacts, that an application to tax an attorneys' or solicitor's bill must be made within twelve months after payment. Where a promissory note is given for an attorney's bill, payable at a future day, the twelve months run from the time the note was paid, and not from the time it was given, unless it were treated as payment at that time.(j)

If the debtor, instead of paying the creditor, directs him to take a bill of a third person, which the creditor does, and the bill is dishonored, the liability of the original debtor revives;(k) and it is not necessary to give the original debtor notice of the dishonor.(l) But if the debtor refer his creditor to a third person for payment generally, and the creditor having the option of taking cash, elects to take a bill, which is dishonored, the original debtor is discharged.(m)

. The consequence of giving a bill to an auctioneer, or other agent who has no authority to receive anything but cash, is, that the party giving the bill is not discharged from the demand of the principal, although the bill fell due at the period when the debt ought to have been discharged, and is regularly paid to the holder.(n)

(i) *Harris v. Shipway*, 1744; *Ewer v. Lady Clifton*, C. B., Trin. T. 1735; S. C., Bul. N. P. 182; *Palfrey v. Baker*, 3 Price, 572; *Davis v. Gyde*, 2 Ad. & Ell. 623, E. C. L. R. vol. 29; 4 N. & M. 462, S. C. Even a bond given for rent does not extinguish it. Rent, though due on a parol lease, is of as high a nature as an obligation. 11 Vin. Ab. 289.

(j) *Sayer v. Wagstaff*, 5 Beav. 415; in re *Harries*, 13 M. & W. 3,* S. C.; In re *Wilton*, Q. B.

(k) *Marsh v. Pedder*, 4 Camp. 257; *Holt*, N. P. C. 72, S. C.; *Ex parte Dickson*, cited 6 T. R. 142; *Taylor v. Briggs*, M. & M. 28; and see *Robinson v. Read*, 9 B. & C. 449, E. C. L. R. vol. 17; 4 M. & Ry. 349, S. C.

(l) *Swinyard v. Bowes*, 5 M. & Sel. 62.

(m) *Strong v. Hart*, 6 B. & C. 160, E. C. L. R. vol. 13; 9 Dowl. & R. 189; 2 C. & P. 55, S. C.; *Smith v. Ferrand*, 7 B. & C. 19, E. C. L. R. vol. 14; 9 Dowl. & R. 803, S. C.; and see *Baillie v. Moore*, 15 L. J. 169, Q. B.; 8 Q. B. Rep. 489, E. C. L. R. vol. 55, S. C.

(n) *Sykes v. Giles*, 5 M. & W. 645.*

(1) *Wolyamest v. Bruner*, 4 Har. & McHenry, 89; *Snyder v. Kunkleman*, 3 Penna. Rep. 487.

The taking of his separate bill from one of several partners for a joint debt, will, as we have seen, discharge the others. Such transaction imports an agreement between the creditor and the firm, that the creditor shall rest on the liability of the one partner alone, and shall discharge the other; that is, an accord—and the separate bill is a satisfaction. For the separate liability of one partner may, in many cases, be more advantageous than his joint liability with others. It is not extinguished, at law, by his pre-decease; in the event of a separate adjudication of bankruptcy against him, it would be satisfied before joint *debts;(o) and it avoids difficulties which [*306] might arise in suing him with another defendant.(p)

Where the creditor's rights against an original debtor are reserved, whether by express agreement,(q) or by the nature of the transaction, or by the original debtor's name being on the new bill, the taking of the bill of one of several, or of a stranger, does not discharge the original debtor.

Where a debtor *indorses* a bill to his creditor, the creditor cannot sue for his debt, without proving presentment of the bill and notice of dishonor.(r) But where he *does not indorse it*, it seems sufficient for the creditor, when suing for the original debt, to show that the bill still remains in his hands, without proving presentment(s) or notice of dishonor,(t) for that is presumptive evidence of dishonor, sufficient to throw it on the defendant to show that the bill has been paid.

If the party who gave the bill knew at the time that it was of no value, the holder, on discovering the fraud, may immediately sue such party on his original liability; or, if the bill were given for goods delivered at the time, he may disaffirm the contract, and sue in trover for the goods. Thus, when a vendee, under terms to pay for goods on delivery, obtained possession of them by giving a check which was afterwards dishonored, Lord Tenterden said, "If the vendee had reasonable ground to expect that the check would be paid, the trans-

(o) 6 Geo. 4, c. 16, s. 62.

(p) *Evans v. Drummond*, 4 Esp. 89; *Reed v. White*, 5 Esp. 122; *Thompson v. Percival*, 5 B. & Ad. 925, E. C. L. R. vol. 27; 3 N. & M. 667, S. C.

(q) *Bedford v. Deakin*, 2 Stark. 178, E. C. L. R. vol. 3; 2 B. & Ald. 210, S. C.

(r) *Kearslake v. Morgan*, 5 T. R. 513; *Bridges v. Berry*, 3 Taunt. 130.

(s) *Goodwin v. Coates*, 1 M. & Rob. 221.

(t) *Bishop v. Rowe*, 3 M. & Sel. 362.

action was not fraudulent, and the property would pass to him; if he had not reasonable ground for so expecting, the transaction was fraudulent, and the vendors are entitled to recover their property in an action of trover."(*u*)(1)

A bill given in discharge of a debt, and then lost, is payment;(*v*) but not if proved to be destroyed.

[*307] *We have already seen(*w*) that it has been held that, where a bill or note is delivered without indorsement, not in payment of a pre-existing debt, but in payment or exchange for goods or other securities sold at the time, such a transaction amounts in general to a sale of such a bill or note, and to an election by the transferee to take it as money with all its risks, and, consequently to complete payment by the transferer.(*x*)(2)

If, in payment of dishonored bills, other bills are given for the sum due, and the first remains in the hands of the holder, if the latter bills are not paid, the liability of parties on the former revives.(*y*)

(*u*) *Hawes v. Crowe*, 1 R. & M. 414; *Puckford v. Maxwell*, 6 T. R. 52; *Owenson v. Morse*, 7 T. R. 64; *Bishop v. Shillito*, 2 B. & Ald. 329, n.; *Taylor v. Plumer*, 3 M. & Sel. 562; *Brown v. Kewley*, 2 B. & P. 518; *Gladstone v. Hadwen*, 1 M. & Sel. 517; *Noble v. Adams*, 7 Taunt. 59, E. C. L. R. vol. 2; *Earl of Bristol v. Wilsmore*, 1 B. & C. 514, E. C. L. R. vol. 8; 2 D. & R. 755, S. C.; *Kilby v. Wilson*, 1 R. & M. 178.

(*v*) *Woodford v. Whiteley*, M. & M. 517. N.B. In this Chapter the word *payment* is not always used in its strict legal sense.

(*w*) Chapter on *Transfer*; and see p. 229.

(*x*) *Camidge v. Allenby*, 6 B. & C. 373, E. C. L. R. vol. 13; 9 D. & R. 391, S. C.; *Ward v. Evans*, 2 Ld. Raym. 928; *Brown v. Kewley*, 2 B. & P. 518. See the Chapter on *Transfer*.

(*y*) *Ex parte Barclay*, 7 Ves. 597; *Bishop v. Rowe*, 3 M. & S. 362; *Dillon v. Rimmer*, 1 Bing. 100, E. C. L. R. vol. 8; 6 Moo. 427, S. C.

(1) *Markle v. Hatfield*, 2 Johns. 455; *Ontario Bank v. Lightbody*, 13 Wendell, 101; *Lowrey v. Murrell*, 2 Porter, 280; *Bayard v. Shunk*, 1 Watts & Serg. 94.

(2) *Patten v. Ash*, 7 Serg. & Rawle, 116; *People v. Howell*, 4 Johns. 296; *Dennis v. Hart*, 2 Pick. 204; *Bayard v. Shunk*, 1 Watts & Serg. 94.

Where the vendor of goods is induced to take the note of a third person as payment, by a fraudulent representation of the solvency of that person, the note is no satisfaction. *Pierce v. Drake*, 15 Johns. 475; *Martin v. Pennock*, 2 Barr, 376.

Where a man in payment of a debt to another gives him a counterfeit bill, if he has notice that it is counterfeit within a reasonable time, he is bound to take it back, and the question of reasonable time is one for the jury. *Simms v. Clark*, 11 Illinois, 137; *Ramsdale v. Horton*, 3 Barr, 330; *Raymond v. Baur*, 13 Serg. & Rawle, 318.

And even if the new bill be duly paid, the holder may recover on the old bill, if the amount of principal and interest due thereon, is not covered by the amount of the new bill.^(z) The holder of an old bill, for the full amount of which a new bill is given, cannot sue on it till the new one is at maturity.^(a)

The taking of a bill or note in payment will, in general, determine a lien. Thus, where the owner of a ship having a lien on the goods, until the delivery of good and approved bills, took a bill of exchange in payment, and, though he objected to it at the time, afterwards negotiated it, it was held that such negotiation amounted to an approval of the bill by him, and to a relinquishment of his lien on the goods.^(b) So, where, for goods sold, the vendor took the vendee's promissory note, and negotiated it with his banker, and it was subsequently dishonored, but continued outstanding in the banker's hands, it was held that the vendor had, by taking the note and negotiating it, relinquished his lien, and that the lien did not revive on the dishonor of the note, the note continuing in the banker's hands.^(c)

But if a bill or note is taken, and, remaining in the vendor's hands is dishonored, the goods not being delivered, it should seem that the lien revives.^(d)

On the sale of real property the taking and negotiating a [*308] note or bill, does not amount to a relinquishment of the lien^(e) on the land.^(f)

A bill, check, or promissory note is earnest, or part payment, within the seventeenth section of the Statute of Frauds, so as to obviate the necessity of a written contract.^(g)

(z) *Lumley v. Musgrave*, 4 Bing. N. C. 9, E. C. L. R. vol. 33; 5 Scott, 230, S. C.

(a) *Kendrick v. Lomax*, 2 C. & J. 405; * 2 Tyr. 538, S. C.

(b) *Horncastle v. Farran*, 3 B. & Ald. 497, E. C. L. R. vol. 5; 2 Stark. 590, S. C.

(c) *Bunney v. Poyntz*, 4 B. & Ad. 568, E. C. L. R. vol. 24; 1 N. & M. 229, S. C.

(d) *New v. Swain*, 1 Dans. & Ll. 193.

(e) *Ex parte Loring*, 1 Rose, 19; *Grant v. Mills*, 2 V. & B. 306. See as to the effect of taking a void check, *Bond v. Warden*, 14 L. J. 154, Chan.

(f) As to the circumstances under which the transfer of a bill is payment in bankruptcy, see the Chapter on *Bankruptcy*.

(g) *Chitty on Bills*, 8th ed., 80, note b, p. 84.

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*CHAPTER XXX.

OF SETS AND COPIES OF BILLS.

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FOREIGN bills(*a*) are often drawn in sets: that is, exemplars or parts of the bill are made on separate pieces of paper, each part being numbered, and referring to the other parts. Each part contains a condition, that it shall continue payable only so long as the others remain unpaid. These parts should circulate together; or one may be forwarded for acceptance while the other is delivered to the indorsee, thus relieving him from the necessity of forwarding his part for acceptance, but giving him the indorser's security immediately, and diminishing the chances of losing the bill.(*b*)(1)

A firm, who were both payees and acceptors of a foreign bill in
 [*310] three parts, indorsed one part to a creditor to remain in his
 *hands till some other security were given for it, and then in-

(*a*) Il existe dans la négociation des lettres de change un usage qui la facilite et assure leur paiement rapide; c'est la faculté de tirer par première, seconde, et troisième, &c., &c., c'est à dire de souscrire plusieurs exemplaires.

Cet usage remonte à des temps déjà reculés; il était en vigueur sous l'ancienne législation, et Cleirac en cite des exemples qui se rapporte au milieu du seizième siècle.

Il n'est pas sans intérêt de reproduire ses observations fort sensées :

“Et de autant que les lettres de change sont des papiers volans, des petits poulets, ou billets, Polizza di Cambio, qui se peuvent facilement esdirer et perdre. Comme aussi le banquier correspondant à Paris peut manquer au paiement, c'est pourquoi, tant le bourgeois qui a tiré, que son commissionnaire residant à Paris, ont chacun besoin d'une copie pour faire leurs diligences. A cette cause le banquier doit écrire, et fournir par précaution deux ou trois copies de la même lettre de semblable teneur.” Nougier des Lettres de Change, 1, 104.

(*b*) The facility which drawing a bill in sets affords for its presentment, has been held to accelerate the time within which a bill, payable after sight, ought to be presented for acceptance. *Straker v. Graham*, 4 M. & W. 721.*

(1) The whole of a set of exchange constitutes but one bill, and payment or cancelling of either of the set extinguishes all. *Durkin v. Cranston*, 7 Johns. 442; *Ingraham v. Gibbs*, 2 Dall. 134; *Miller v. Hackley, Anthon*, 68.

As to the different sets of bills, see *Kenworthy v. Hopkins*, 1 Johns. Cas. 107.

dorsed another part of the same bill for value to a third person. They afterwards gave the first indorsee the proposed security, and took back the first part of the bill from him. Held, that the holder of the second part was not precluded from recovering against the firm: first because the substitution of the security for the first part was not a payment; and secondly, because the firm were, as between themselves and the second indorsee, estopped from disputing the regularity of their acceptance and indorsement of the second part.(c)

But as between bona fide holders for value of different parts of the same bill, he who first obtains a title to his part, is entitled to the other parts,(d) and may, it has been said, maintain trover for them, even against a subsequent bona fide holder.(e)

If a man be under an obligation to deliver a foreign bill, it seems he is bound to deliver as many parts as may be applied for.(f)

An omission on one part to express the reference to the others, and the condition relating to them, may have the effect of obliging the drawer to pay more than one part.(g)

The drawee should accept only one part. For if two accepted parts should come into the hands of different holders, and the acceptor should pay one, it is possible that he may be obliged to pay the other part also.(h)

And he should not pay without taking back the part which he has accepted,(i) for, having paid the unaccepted part, he may be obliged afterwards to pay the accepted part also.

(c) *Holdsworth v. Hunter*, 10 B. & C. 449, E. C. L. R. vol. 21.

(d) *Ibid.*; *Perreira v. Jopp*, 10 B. & C. 450, n., E. C. L. R. vol. 21.

(e) For it is the duty of a person taking one of several parts to inquire after the others: *Lang v. Smyth*, 7 Bing. 284, 294, E. C. L. R. vol. 20; 5 M. & P. 78, S. C.; and he is advertised by the part which he does take, that he takes it without the others at his peril.

(f) 1 Pard. 334. But since each part is now subject to a stamp, it may be doubtful whether he is so bound, unless the party applying will furnish the extra stamps.

(g) *Davison v. Robertson*, 3 Dow. 218, 288; *Beawes*, 430; *Poth.* 111; 2 Pard. 367. But not an inaccurate reference or an omission to name one part obviously by mistake. *Bayley*, 6th ed. 30.

(h) See *Holdsworth v. Hunter*, *supra*.

(i) "Celui qui paie une lettre de change sur une deuxième, troisième, quatrième, &c., sans retirer celle sur laquelle se trouve son acceptation n'opère point sa libération à l'égard du tiers porteur de son acceptation." *Code de Commerce*, Art. 148.

[*311] *And if an indorser improperly circulate two parts to distinct holders, he may be liable on each.(j) The forgery of the payee's indorsement on one of the parts will of course pass no interest even to a bona fide holder.(k)

It is conceived, that an indorser is not bound to pay any one part, unless every part bearing his indorsement is delivered up to him.(l)

Copies of bills are not, it is believed, much used in this country. A protest may be made on the copy of a bill in some cases.(m) But, abroad, when a bill is not drawn in sets, it is sometimes the practice to negotiate a copy, while the original is forwarded to a distance for acceptance.

In such a case, the person who circulates the copy should transcribe the body of the bill, and all the indorsements, including his own, literally, and, after all, he should write "Copy:—the original being with such a person." If he should omit to state that the bill is a copy, or to write his own indorsement *after* the word *copy*, he may become liable on the copy as on an original.(n)

(j) See Holdsworth v. Hunter, *supra*.

(k) Cheap v. Harley, 2 T. R. 127; see Smith v. Mercer, 6 Taunt. 80, E. C. L. R. vol. 1; 1 Marsh. 453, S. C.; Fuller v. Smith 1 C. & P. 197, E. C. L. R. vol. 12; Ry. & M. 49, S. C.

(l) Lorsqu'une deuxième porte qu'elle ne sera payée qu'autant que la première ne l'aura pas été, l'endosseur qui endosse les deux exemplaires n'est point responsable envers le porteur de la seconde qui a reçu ce titre, tandis que la première était également en circulation.

Dans ce cas le porteur de la seconde est averti par les énonciations qu'elle contient. Pour se mettre à l'abri des fraudes de son cédant, il doit se faire remettre la première. Cour de Cassation, 4 Avril, 1832; Sirey, l. 32, l. 29.

(m) Dehers v. Harriot, 1 Show. 163.

(n) L'usage des copies quoiqu'il ne soit pas consacré par la loi n'en est pas moins valable. L'endosseur qui crée une copie, après avoir négocié l'original, est tenu de mentionner dans la copie l'endossement qu'il a écrit sur le titre même. Si, au contraire, après ces mots *pour copie*, il appose un endos, il fait supposer que l'original n'est pas endossé, et il est responsable vis-à-vis du porteur de bonne foi de la copie. Cour Royale de Paris, 14 Janvier, 1830; Sirey, t. 30, l. 172.

*CHAPTER XXXI.

[*312]

OF FOREIGN BILLS AND NOTES, AND OF FOREIGN LAW RELATING
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BILLS of exchange are either foreign or inland. (a) Inland bills of exchange are such as are both drawn and payable in England, Wales, or Berwick-on-Tweed, or drawn and payable in Ireland, or drawn and payable in Scotland. (b)

*Foreign bills as distinguished from inland bills, are such as are drawn or payable, or both, abroad, or drawn in one realm of the United Kingdom, and payable in another. [*313]

(a) Holt, C. J., "I remember when actions upon inland bills of exchange did first begin, and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant's counsel would put them to prove the custom, at which Hale, who tried it, laughed, and said, they had a hopeful case on't." Buller v. Crips, 6 Mod. 29; 1 Salk. 130; Holt, 119, S. C.

(b) A bill drawn in England on a person residing abroad, but drawn and accepted payable in England, has been held an inland bill within the Stamp Act. Amner v. Clarke, 2 C. M. & R. 468.*

Bills drawn in England, and payable in Scotland, or Ireland, or vice versa, are foreign bills, for they were so before the union between the countries, and the union does not make them inland bills.^(c) But bills drawn and payable in Scotland, or drawn and payable in Ireland, are inland bills within 1 & 2 Geo. 4, c. 78, to which an acceptance in writing is necessary.^(d)

A bill of exchange is *prima facie* an inland bill. When an action is brought on a foreign bill, against a drawer or indorser, the declaration ought to disclose that it is a foreign bill. And if it do not, the defendant will be entitled to succeed on the ordinary traverses of the material allegations in the declaration.^(e)

The acceptor of a bill, purporting to be a foreign bill, but really made in England, and known by the acceptor to be so, is not precluded from objecting, in an action by an innocent indorsee, that it is really an inland bill and therefore void for want of a stamp.^(f)

Foreign bills are frequently drawn in sets: that is, exemplars or parts of the bill are made on separate pieces of paper, each part referring to the other parts, and containing a condition that it shall continue payable only so long as the others remain unpaid.

For the law on this subject the reader is referred to the preceding Chapter on SETS AND COPIES OF BILLS.

As to the presentment of foreign bills for acceptance or payment, see the Chapters on PRESENTMENT FOR ACCEPTANCE, and PRESENTMENT FOR PAYMENT.

As to the English law regulating the acceptance of foreign bills in this country, see the Chapter on ACCEPTANCE.

As to the protest of foreign bills, see the Chapter on PROTEST.

[*314] Sometimes bills drawn in England are payable in a foreign *country, and bills drawn in a foreign country are payable in England. Sometimes English bills circulate abroad, and foreign bills circulate here; and frequently suits on foreign bills, or bills nego-

(c) *Mahoney v. Ashling*, 2 B. & Ad. 478, E. C. L. R. vol. 22.

(d) *Ibid.*

(e) *Armani v. Castrique*, 13 M. & W. 443.*

(f) *Steadman v. Duhamel*, 1 C. B. Rep. 888, E. C. L. R. vol. 50. .

tiated abroad, are brought in English Courts of justice. The laws of foreign countries, as to bills of exchange, often differ widely from the law of England, and from each other. But natural justice, mutual convenience, and the practice of all civilized nations, require that contracts, wherever enforced, should be regulated and interpreted according to the laws with reference to which they were made, otherwise the rights and liabilities of parties would entirely depend on the law of the country where the remedy might happen to be sought. Such a state of things would introduce uncertainty and confusion infinitely greater than arises from that measure of respect and comity, which every tribunal now shows to the laws of foreign nations.

In determining how far foreign laws are to regulate foreign contracts in English Courts, a great variety of circumstances are often necessary to be considered. It may be essential to regard the domicile, of one, or both, or all, of the contracting parties, the place where the contract is made (which place it may not always be easy to determine), the place where the contract is to be performed, the place where the subject-matter of the contract is locally situate, and the place where the remedy is sought.

Many nice questions, therefore, have already arisen, and many more will, no doubt, in future arise in our courts, from the conflict of English with foreign law, as to bills of exchange.

The decisions of English Courts of justice on the international law of contracts have not been very numerous, but nothing can exceed the discrepancy and irreconcilable contrariety of the doctrines and opinions of foreign writers, not only on the application of the principles of international law to foreign contracts, but on the very principles themselves.^(g) To enter into the discussion of such topics would be foreign to the object and exceed the limits of this little book.

But in the dearth of authoritative decisions on the degree to which foreign law is admissible here to govern the contracts arising on bills or notes made or negotiated abroad, it may not *be altogether useless, with a view as well to the right understanding of [*315] such decisions as have already been pronounced, as to the solution of

(g) See the very learned work on the *Conflict of Laws*, for which not only his own country, but the United Kingdom is deeply indebted to the late Mr. Justice Story.

such undecided questions on the same subject as may hereafter arise, to enumerate some of the general principles which seem to have guided the English Courts in determining the circumstances, and the degree in which they will respect foreign laws, in interpreting foreign contracts.

The following appear to rank among established principles in the law of this country.

First, every contract is, in general, to be regulated by the laws of the country in which it is made. For the laws of that country alone are there binding *proprio vigore* on aliens as well as on natural born subjects,^(h) and the parties to the contract may generally be taken to have contemplated the legal consequences which those laws deduce from their stipulations.

Hence the formalities essential to the validity of the contract, and the interpretation of that contract, are to be governed by the laws of the country where it is made.⁽¹⁾

But, secondly, where a contract is made in one country to be performed in another, the country where the contract is to be performed is deemed the country in which it was made. Such seems to be the general rule of the civil law. "*Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit.*" Some learned civilians have, indeed, entertained a different opinion, but such is unquestionably the general rule in the common law of England. "The law of the place," says Lord Mansfield, "can never be the rule, where the transaction is entered into with the express view of the law of another country, as the rule by which it is to be governed."⁽ⁱ⁾⁽²⁾

(h) According to some foreign writers, the domicile of persons entering into a contract, while in a foreign country, is to be considered in those contracts. Difficulties then arise, where the domicile of two or more of the contracting parties is not the same. The common law does not, it should seem, regard these niceties.

But *quære*, how far the domicile of parties to bills of exchange regulates their personal capacity or incapacity to contract.

(i) *Robinson v. Bland*, 2 Bur. Rep. 1077; 1 Bla. R. 256, S. C.; and see *Rothschild v. Currie*, 1 Q. B. Rep. 43, E. C. L. R. vol. 41; see *Story's Conflict of Laws*, 280 to 281.

(1) *Cox v. U. States*, 6 Peters, 172; *Carnegie v. Morrison*, 2 Metc. 381, 397; *Bulger v. Roche*, 11 Pick. 36; *Bruchett v. Norton*, 4 Conn. 517; *Sherrill v. Hopkins*, 1 Cowen, 103; *Allen v. Watson*, 2 Hill, S. C. 319; *Loan Co. v. Towner*, 13 Conn. 249; *Watson v. Brewster*, 1 Barr, 381; *Watson v. Orr*, 3 Devereux, 161; *Martin v. Martin*, 1 Smedes & Marsh. 176; *Roe v. Jerome*, 18 Conn. 138; *Palmer v. Yarrington*, 1 Ohio State Rep. 253.

(2) *Smith v. Mead*, 3 Conn. 253; *Thompson v. Ketcham*, 4 Johns. 285; 8 *Ibid.*

Thirdly, contracts immoral or contrary to the law of nations, or injurious to British public interests, though valid where made, will not be enforced on behalf of a guilty party in our Courts.(1)

*But, fourthly, one country will not regard the revenue laws of another country. [*316]

Fifthly, the remedy is to be governed by the law of the country where that remedy is sought.(2)

The following are instances of the supremacy of the *lex loci contractus* according to the first general rule.

An acceptance void, or avoided by the law of the country where it is given, is not binding here. By the law of Leghorn, if a bill be accepted, the drawer then fail, and the acceptor had not sufficient effects of the drawer in his hands at the time of acceptance, the acceptance becomes void. An acceptor at Leghorn, under these circumstances, instituted a suit at Leghorn, and his acceptance was thereupon vacated. Afterwards, he was sued in England as acceptor, and now filed his bill for an injunction and relief. Lord Chancellor

189; Warren v. Lynch, 5 Ibid. 239; Pope v. Nickerson, 3 Story, 465; Goddin v. Shipley, 7 B. Monroe, 575; Broadhead v. Noyes, 9 Missouri, 56; Dorsey v. Hardesty, Ibid. 157; Sherman v. Gasset, 4 Gilman, 521; Tyler v. Trabur, 8 B. Monroe, 306.

(1) The laws of foreign countries are not admitted, *ex proprio vigore*, but only *ex comitate*; and the judicial power will exercise a discretion with respect to the laws they may be called upon to sanction. If they are manifestly unjust or calculated to injure our own citizens, they ought to be rejected. Tappan v. Poor, 15 Mass. 419; Cambridge v. Lexington, 1 Pick. 506.

Upon principles of national comity, a contract made in a foreign place and to be there executed, if valid by the laws of that place, may be a valid ground of action in the courts of this state, although not valid or even prohibited, by our laws, unless this state or its citizens would be injured by giving legal effect to it, or it would be a pernicious and detestable example to them. Greenwood v. Curtis, 6 Mass. 358, 377.

(2) Titus v. Hobart, 5 Mason, 378; Robinson v. Campbell, 3 Wheaton, 212; Blanchard v. Russel, 13 Mass. 15; Smith v. Spinolla, 2 Johns. 198; Andrews v. Herriot, 4 Cowen, 508; Wood v. Malin, 5 Halsted, 208; Ayres v. Auderbon, 2 Hill, S. C. 601; Watson v. Brewster, 1 Barr, 381; Givins v. Western Bank, 2 Alabama, 397; Smith v. Atwood, 3 McLean, 545; McKissick v. McKissick, 6 Humph. 75; Wood v. Watkinson, 17 Conn. 500; Broadhead v. Noyes, 9 Missouri, 56; Dorsey v. Hardesty, Ibid. 157.

King granted a perpetual injunction, enjoining the plaintiff at law from suing on the bill.(j)(1)

(j) *Burrows v. Jemino*, 2 Stra. 733; Sel. Ca. 144; 2 Equ. Abr. 526; see *Wynne v. Calendar*, 1 Rus. 295.

(1) Where a note is made payable generally, the law of the place where it is made must determine the construction to be given to it, and the obligation and duty it imposes. *Bank of Orange Co. v. Colby*, 12 N. Hamp. 520; *Stacey v. Baker*, 1 Scam. 417; *Rowell v. Buck*, 14 Verm. 147; *Bliss v. Houghton*, 13 New Hamp. 126; *Reddick v. Jones*, 6 Iredell, 107.

The liability of the drawer of a bill is governed by the law of the place where it is drawn. *Crawford v. Branch Bank*, 6 Alabama, 12.

A. domiciled here, accepts in Manchester, England, a bill drawn by B. an English merchant, resident there, payable to B. or order in London. B. sues A. here upon the bill. This is a foreign bill as if accepted, payable in London. *Grimshaw v. Bender*, 6 Mass. 157.

Where a house in New York drew a bill of exchange on a house in London, which was accepted and paid in London, thereby creating a debt from the drawers to the acceptor, it was held, that London was the place of the contract. *Lizardi v. Cohen*, 3 Gill, 430.

A promissory note made between parties resident in New York, and there negotiated while still current, but paid by the maker before maturity, was afterwards sued in Vermont, in the name of a bona fide holder for value; held, that the maker could not avail himself of the payment in defence, although by the law of Vermont, in force at the time of such payment, it would have afforded a good defence to the action. *Harrison v. Edwards*, 12 Vermont, 648.

The law of Mississippi, allowing to the maker of a promissory note, the benefit of all defences against the indorser which he had against the payee before notice of the indorsement, applies to a suit brought in another state, on a note payable in Mississippi, and indorsed in Mississippi. *Brubston v. Gibson*, 9 Howard, U. S. 263.

Notes were given in New York for a usurious loan, both parties being there at the time. When the note became payable, a new contract was made by the parties for an extension of the time of payment, and new notes were made for the amount due, dated in New York, which were delivered to the lender in the State of Connecticut, where he was then staying, and the old notes were then given up. The notes were not made payable at any particular place. Held, that the new contract was made in Connecticut, and to be governed by its laws as to its nature, validity, and effect. *Jacks v. Nichols*, 5 Barbour, S. C. 38.

Where the libellants took a promissory note of the owners of a ship in New York for materials there furnished, held, that it was governed by the *lex loci*, by which the note was only conditional payment. *Bark Chusan*, 2 Story, 55.

The law of a place where a note is payable, determines what is a default by the maker. But the contract of the indorser is regulated by that of the country where the indorsement is made. *Hatcher v. McMorine*, 4 Devereux, 122; *Dow v. Russell*, 12 N. Hamp. 49; *Holt v. Salmon*, 1 Rice, 91; *Dunn v. Adams*, 1 Alabama, 527; *Yeatman v. Cullen*, 5 Blackford, 240; *Lowry's adm. v. Western Bank*, 7 Alabama, 120; *Holbrook v. Vibbard*, 2 Scam. 465; *Musson v. Lake*, 4 Howard, U. S. 262;

A bill of exchange was drawn in France, and indorsed in blank in France without following the formalities prescribed by the French law. It was held, that the indorsement being void by the French law, was void here, for that the contract and indorsement being made in France, must be governed by the law of France.^(k)(1)

Where the defendant gave the plaintiff, in a foreign country, where both were resident, a bill of exchange drawn by the defendant on a person in England, which bill was afterwards protested here for non-acceptance, and the defendant, afterwards, while still resident abroad, became bankrupt there, and obtained a certificate of discharge by the law of that state, it was held, that such certificate was a bar to an action here, upon an implied assumpsit to pay the amount of the bill, because the implied contract was made abroad.^(l)

The following are cases in which the *lex loci solutionis* has been held to govern.

An I. O. U. given for money lent in Germany, to *play at [*317] games of chance, not illegal in Germany, is valid here.^(m)

A promissory note payable to bearer made and payable in England is transferable by delivery abroad, although by the law of the country where the delivery takes place, mere delivery is inoperative.⁽ⁿ⁾

The time of payment is to be calculated according to the law of the

(k) *Trimby v. Vignier*, 1 Bing. Ca. 151; 4 M. & Scott, 695; 6 C. & P. 25, E. C. L. R. vol. 25; S. C.; but see *Wynne v. Jackson*, 2 Russ. 51.

(l) *Potter v. Brown*, 5 East, 124; 1 Smith, 351, S. C.

(m) *Quarrier v. Colston*, 12 L. J. 57, Chanc.

(n) *De la Chaumette v. Bank of England*, 2 B. & Ad. 385, E. C. L. R. vol. 22; and 9 B. & C. 208.

Cox v. Adams, 2 Kelly, 158; *Dundas v. Bowler*, 3 McLean, 397; *Bank of Illinois v. Brady*, *Ibid.* 268; *Snow v. Perkins*, 2 Michigan, 238; *Bernard v. Barry*, 1 G. Greene, 388.

(1) The payee of a promissory note, which was executed and made payable in New York, having indorsed it in Indiana, was sued in Indiana, on his indorsement: Held, that the indorsement must be governed by the law of New York; and that if the diligence necessary by the law of that state to fix the indorsement has been used, the defendant was liable. *Shanklin v. Cooper*, 8 Blackford, 41.

An indorser is liable for interest on a bill according to the law of the place on which it is drawn. *Mullen v. Morris*, 2 Barr, 85.

country where the bill is made payable.(o) For example, the days of grace.

The protest and notice of dishonor must be regulated by the law of the country where the bill is payable.(1) A bill was drawn in England in favor of the defendant a payee in England on a house in Paris, and accepted in Paris, *payable there*, and indorsed to the plaintiff in England. The bill being dishonored by non-payment, notice was given to the plaintiff in England, which notice was good according to the French law, but too late according to the English law. The notice was transmitted the same day by the plaintiff to the defendant. An action was brought in England by the plaintiff, the English indorsee, against the defendant, an English indorser. It was insisted by the defendant that the requisites of the notice, which was received in England should, as between the indorsee and indorser, both domiciled in England, be regulated by the English law. But the Court of Queen's Bench held, that the bill being payable in France was to be considered, even as between the indorsee and indorser, as a French contract, and that the French law, as to notice of dishonor, must therefore so far prevail.(p)(2)

But a general acceptance being a contract to pay everywhere, is governed by the law of the place where it is given, for it is payable there as well as in every other place.(q)(3)

(o) Beawes, 151; Marius, 75, 89 to 92, 101 to 103; Bayley, 6th ed. 249. See ante, p. 163, 164.

(p) Rothschild v. Currie, 1 Q. B. Rep. 43, E. C. L. R. vol. 41.

(q) Don v. Lipman, 5 Clark & Fin. 1, 12, 15; Sprowle v. Legge, 1 B. & C. 16, E. C. L. R. vol. 8; 2 D. & R. 15; 3 Stark. 156, S. C.; Kearney v. King, 2 B. & Ald. 301.

(1) The evidence, however, is regulated by the *lex fori*. The certificate of a foreign notary of demand and notice as to a promissory note, though evidence by the law of the place where the note is payable, is not therefore admissible elsewhere. Kitland v. Wanzer, 2 Duer, 277.

(2) Ellis v. The Commercial Bank, 7 Howard, Miss. 294.

(3) The liability of acceptors of a bill of exchange is to be ascertained by the law of the place where the bill is made payable. Frazier v. Warfield, 9 Smedes & Marshall, 220.

Where a bill is made payable generally and accepted generally, the place of the address on the face of the bill is the place of payment; and the law of that place governs the contract of acceptance, although the acceptors reside in a different place. Frazier v. Warfield, 9 Smedes & Marshall, 220.

Where bills are accepted, payable in London, on a promise to provide funds to

The third rule is, that contracts immoral or contrary to the law of nations, or injurious to British public interests, will not be enforced on behalf of a guilty party in our Courts.

*The following are instances of the fourth rule that the English Courts will not regard the revenue laws of other countries.^(r) [*318]

Bills or notes drawn or made in a foreign independent state, or at sea (except those payable to bearer on demand), do not require, in order to their validity in this country, an English stamp, nor a stamp of the country where they are made or drawn.^(s) "In the time of Lord Mansfield," observes Abbott, C. J.,^(t) "it became a maxim, that the Courts of this country will not take notice of the revenue laws of a foreign state. There is no reciprocity between nations in this respect. Foreign states do not take any notice of our Stamp Laws, and why should we be so courteous to them, when they do not give effect to ours. It would be productive of prodigious inconvenience, if, in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that

(r) See *Pellecat v. Angell*, 2 C. M. & R. 311.*

(s) *Rotch v. Edie*, 6 T. R. 425; *Boucher v. Lawson*, Rep. Temp. Hardwicke, 198; *Holman v. Johnson*, Cowp. 343; *Clugas v. Penaluna*, 4 T. R. 467.

(t) *James v. Catherwood*, 3 D. & R. 190, E. C. L. R. vol. 16; *Wynne v. Jackson*, 2 Russ. 351; but see the note to Dr. Story's *Conflict of Laws*, 2d ed. p. 341.

meet them, the contract is governed by the law of England. *Bainbridge v. Wilcocks*, 1 Baldwin, 536.

A letter of credit from persons in New Orleans addressed to one in Cincinnati, agreeing to accept bills of exchange to be drawn by the latter, is governed by the law of Ohio, and not by that of Louisiana. *Lonsdale v. Lafayette Bank*, 18 Ohio, 186.

Where the *lex loci contractus* requires a notice of the non-acceptance of a bill presented before maturity, an omission to notify will not be excused, because, by the law merchant of the place where the bill was presented, notice of non-acceptance is unnecessary. *Allen v. Merchants Bank*, 22 Wendell, 215.

Where a bill is drawn in New York payable in Alabama, which does not contemplate the payment of interest on its face, and interest accrues only in default of payment at maturity, the rate of interest will be governed by the laws of Alabama. But where a loan is made in New York and the interest is there paid on it, and a bill is drawn there payable in Alabama, for the amount of the loan, with interest at a rate usurious in Alabama, the law of New York furnishes the criterion by which it is to be determined whether the contract is usurious. *Hanrich v. Andrews*, 9 Porter, 9.

country was, in order to ascertain whether the instrument was or was not valid." But bills drawn in England and payable abroad are, as we have seen, subject to an English stamp. If a bill be drawn in England, on a person abroad, and made payable in England, by both drawer and acceptor, it requires to be stamped as an inland bill.^(u)

If the bill or note were made in any part of the British empire, it must have the stamp appropriated by the law of the place.^(v)

If an unstamped bill tendered in evidence as a foreign bill be really drawn in England, the proper course is for the defendant to object to the admissibility of the bill, and at once to give his evidence on the point, and for the *Judge* to decide whether it be a foreign or an inland bill.^(w)

A question sometimes arises as to what shall be such a making [*319] *within this country as to subject to the English Stamp Laws. The firm of B. and C., in Ireland, had one partner A., resident in this country, where he also carried on a separate trade. They sent him over four signatures, made by them, on copperplate impressions, as drawers and indorsers, with blanks for dates, sums, and drawees' names. He filled them up and used them. It was held, that as the bills were *signed* in Ireland, they must be considered as *made* there, and, consequently that they only require an *Irish* stamp.^(x) So, where a bill was drawn in Jamaica, on a stamp of that island only, and a blank was left for the payee's name, it was held that an English stamp was not necessary to the validity of the insertion of the bearer's name in England.^(y) So, a bill sketched out and accepted here, but afterwards signed by the drawer abroad, is to be considered as *made* abroad.

The presumption is, that a bill, purporting to be drawn abroad, was really so drawn. But evidence is admissible to show that a bill, purporting to have been drawn abroad, was in fact drawn in England,

(u) *Amner v. Clark*, 2 C. M. & R. 468.*

(v) *Alves v. Hodgson*, 7 T. R. 241; *Clegg v. Levy*, 3 Camp. 166. A local stamp law must be proved by the person who relies on it. *Buchanan v. Rucher*, 1 Camp. 63; *Le Cheminant v. Pearson*, 4 Taunt. 367; *Miller v. Heinrick*, 4 Camp. 155.

(w) *Bartlett v. Smith*, 11 M. & W. 483.* No party is estopped from objecting to the stamp, because the bill is an inland bill, ante, p. 313, n. (f).

(x) *Snaith v. Mingay*, 1 M. & Sel. 87.

(y) *Crutchley v. Mann*, 5 Taunt. 529, E. C. L. R. vol. 1; 1 Marsh. 29, S. C.

and is therefore void for want of a stamp. If a bill purport to be drawn abroad, and the defence is that it was drawn here, and therefore should have a stamp, the proof should be most distinct and positive. Action on a bill dated Paris, 1st March; defence that it was drawn in London, and proof that the drawer was in London, the 3d March, at eleven in the forenoon. Lord Ellenborough—"It is not very probable this bill was drawn in Paris, on the 1st March; but if it were proved ever so distinctly that it was not drawn in Paris on the 1st March, it would not follow that it was not drawn there at some other time, or that it was drawn in England. Drawing here with a foreign date, to evade the stamp duties, is a very serious offence, and the fact must be made out by distinct evidence."^(z)

A party to the fraud is not precluded from showing that a bill, purporting to be a foreign bill, is really an inland one.^(a)

The following are instances of the application to bills of exchange of the last rule, viz. :—that though the *lex loci contractus* must interpret the contract, yet that the *lex fori* must govern the remedy.

*Statutes of Limitation affect the remedy only, and not the substance of the contract.^(b)(1) [*320]

^(z) *Abraham v. Dubois*, 4 Camp. 269; *Bire v. Moreau*, 2 C. & P. 376, E. C. L. R. vol. 12.

^(a) Ante, p. 313, n. (*f*).

^(b) Quære, whether that be so where the statute not merely limits the remedy, but actually extinguishes the debt. See *Huber v. Steiner*, 2 Bing. N. C. 202, 211, E. C. L. R. vol. 29; 2 Scott, 304; 1 Hodges, 206, S. C.; *Donn v. Lipman*, 1 Clark & Fennelly, 1, 16, 17; Story, 2d ed. 840. In such a case it should seem that the statute is equivalent to a release.

(1) *Hankins v. Barney*, 5 Peters, 457; *McElmoyle v. Cohen*, 13 Peters, 312; *Richards v. Bickley*, 13 Serg. & Rawle, 395; *Jones v. Hook*, 2 Randolph, 303; *Lincoln v. Battele*, 6 Wendell, 475; *Williams v. Preston*, 3 J. J. Marshall, 600; *Cartier v. Page*, 8 Vermont, 150; *Chenot v. Lefevre*, 3 Gilman, 637; *Estes v. Kyle*, 1 Meigs, 34; *King v. Lane*, 7 Missouri, 241; *Watson v. Brewster*, 1 Barr, 381; *Townsend v. Jemison*, 9 Howard, U. S. 407.

Where a cause of action is barred by the statute of limitations of the state in which the subject-matter is situated, an action cannot be maintained in another state. *Cargile v. Harrison*, 9 B. Monroe, 518.

If the maker of a note remain in the state in which it was made until an action upon it in that state is barred by the statute of limitations, that may be pleaded in bar to an action on the note in any other state to which he may remove. *Goodman v. Munks*, 8 Porter, 84.

A., who had become a resident of Texas, made a note in South Carolina on which

Therefore, where, by the law of the country where the contract was made, the plaintiff would have had forty years to bring his action, yet, as he sued in England, it was held that he must bring his action within six years.^(c) So, on the other hand, though the payee of a French promissory note must, if he had sued in France, have brought his action there within five years, it was held that he might here bring his action at any time within six years.^(d)

So, though a defendant may not be subject to arrest in the country where the contract is made, yet he is subject to arrest where the law of this country gives the creditor the right to arrest, if the remedy is sought here.^(e)

The protest and notice of dishonor are parcel of the contract, and not incidents of the remedy for the breach of it. They must, therefore, be regulated by the law of the country where the bill is payable.^(f)(1)

When foreign law is relied on in pleading, it is necessary first to state what the foreign law is, and then to allege the facts, bringing the case within that foreign law.^(g)

It will be assumed, that the law of a foreign country is the same as the law of this country in respect of negotiable instruments till

(c) *British Linen Company v. Drummond*, 10 B. & C. 903, E. C. L. R. vol. 21.

(d) *Huber v. Steiner*, 2 Bing. N. Ca. 202, E. C. L. R. vol. 29; 2 Scott, 304; 1 Hodges, 206, S. C. See *Donn v. Lipman*, 1 Clark & Finelly, pp. 1, 15, 16.

(e) *De la Vega v. Vianna*, 1 B. & Ad. 284, E. C. L. R. vol. 20; and see *Shaw v. Harvey*, M. & M. 526.

(f) *Rothschild v. Currie*, 1 Q. B. Rep. 43, E. C. L. R. vol. 41. See *Rothschild v. Barnes*, Q. B. 1842.

(g) *Benham v. Lord Mornington*, 3 C. B. 133, E. C. L. R. vol. 54.

he was sued in Texas. He pleaded the statute of limitations of both states. Held, that the plea of the statute of South Carolina was not good, as the claim was not barred at the time of his immigration to Texas, but that the plea of the statute of Texas was good. *Smith v. Crosby*, 2 Texas, 414.

Assumpsit cannot be maintained in Maryland upon a single bill made in Virginia, which according to the laws of Virginia is not a specialty, but is according to the laws of Maryland. *Trasher v. Everhart*, 3 Gill & Johns. 234. Contra, *Watson v. Brewster*, 1 Barr, 381; *Dorsey v. Hardesty*, 9 Missouri, 157.

In an action of assumpsit upon a note, what is matter of set-off must be determined by the laws of the state where the action is brought, and not by the laws of the state where the note is made. *Gibbs v. Howard*, 2 N. Hamp. 296.

(1) *Ellis v. Commercial Bank*, 7 Howard, Miss. 294.

the contrary be proved. Therefore, if a promissory note made in Scotland be sued upon in this country, and there be any difference in the law of the two countries as to the liability of the defendant, it lies upon the defendant to prove that difference.(h)(1)

*CHAPTER XXXII.

[*321]

OF THE REMEDY BY ACTION ON A BILL.

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THE holder of the bill at the time of action brought, *i. e.* the person who is then entitled at law to receive its contents, is the only

(h) *Brown v. Gracey, D. & R., N. P. Ca. 41, n., per Abbott, C. J.; but see De la Chaumette v. Bank of England, supra.*

(1) *Martin v. Martin, 1 Smedes & Marsh. 176.*

Where a suit was brought in Iowa against an indorser, upon a negotiable promissory note made in Missouri and indorsed in Maryland, it was held, in the absence of proof of any statute in the latter states to the contrary, that the indorser was liable upon demand and notice, without suit against the maker, although the statute of Iowa requires such suit against the makers. *Bernard v. Barry, 1 Iowa, 388.*

person who can then sue on it. It is a good defence, that at the time of action commenced the bill was outstanding in the hands of an indorsee. But if such indorsee held the bill as agent or trustee for the plaintiff, the plaintiff may sue, though not in actual possession of the bill.(a)(1)

[*322] *An indorser who pays an indorsee has no right to sue a prior party in the name of the indorsee without his consent, and the Court has allowed the defendant, as well as the indorsee, whose name has been usurped, to raise the objection.(b)

Where there is a count on the bill, and a count on the consideration, the plaintiff may be entitled to enter his verdict on both counts.(c)

Wherever, to the holder of a bill, several parties are liable, he is not obliged to single out one only, but may proceed at once in distinct and concurrent actions against them all, or against as many as he may think fit; but a substantial and not a mere technical satisfaction of the debt by any one will discharge all the others.

After a party has once levied the amount of the debt on the goods of one party, the Court will grant a rule to restrain him from levying it over again on the goods of another, and have intimated that they would punish a plaintiff who should take out execution on both judgments.(d)

If a party be liable on a bill in two or more capacities, he may be

(a) *Stone v. Butt*, 2 C. & M. 416; 2 Dow. P. C. 335; *Dabbs v. Humphries*, 10 Bing. 446, E. C. L. R. vol. 25; *Moore & Sco*. 285, S. C.; *Dabbs v. Humphries*, 1 Scott, 325.

(b) *Coleman v. Bredman*, 7 C. B. Rep. 871, E. C. L. R. vol. 62; but see *Doe dem. Vine v. Figgins*, 3 Taunt. 440.

(c) *Ryder v. Ellis*, 8 C. & P. 357, E. C. L. R. vol. 34.

(d) *Windham v. Wither*, 1 Stra. 515; *Ex parte Wildman*, 2 Ves. Sen. 115.

(1) After due demand and refusal of payment of a bill and notice thereof to the indorser deposited in the post-office, an action may be commenced against the indorser on the same day, although, by regular course of the mails, the notice would not reach him until the next day. *Flint v. Rogers*, 3 Shepl. 67.

An action may be maintained upon a note against the maker, where the writ is made after sunset on the last day of grace, although there is no demand of payment before the writ is made. *Butler v. Kimball*, 5 Metc. 94.

the object of several actions on the same bill, at the suit of the same plaintiff. Thus, where a party was sued jointly with others, as a drawer, and separately as the acceptor, of a bill, the Court, considering him liable in the two characters, and the plaintiff entitled to both remedies, which could not be comprised in the same declaration, refused to stay the proceedings in either, as vexatious.(e)

Though, after the principal sum due on a bill has been once paid by any one of the parties, or levied upon the goods of any one, the holder cannot recover it again from any other of the parties, yet, if other actions were pending at the time of payment, he may proceed in them for costs, without reserving any part of the principal sum.(f)

Indorsers, who have to pay costs of action against them, [*323] *cannot sustain an action for those costs against the acceptor,(g) nor, it is conceived, against any other party. In common language, a bill accepted or indorsed without any consideration moving to the party making himself liable on the bill, is called an accommodation bill; but, in strictness,(h) an accommodation bill is not merely a bill accepted or indorsed without value received by the acceptor or indorser, but a bill accepted or indorsed without value by the acceptor or indorser, to accommodate the drawer, or some other party; i. e. that the party accommodated may raise money upon it, or otherwise make use of it. This distinction is of importance; for a party accepting a bill merely without consideration (as if, for example, he does not know the state of accounts between himself and the drawer), and afterwards sued on that bill, cannot charge the drawer with the costs of defending the action;(i) whereas, the acceptor of an accommodation bill, properly so called, who is compelled by an action to pay it, has a claim upon the drawer for all the expenses of the action.(k)(1)

(e) *Wise v. Prowse*, 9 Price, 393.

(f) *Toms v. Powell*, 7 East, 536; 3 Smith, 554; 6 Esp. 40, S. C.; *Page v. Wiple*, 3 East, 314; *Godard v. Benjamin*, 3 Camp. 33; *Holland v. Jourdine*, Holt's N. P. C. 6. (g) *Dawson v. Morgan*, 9 B. & C. 618, E. C. L. R. vol. 17.

(h) See ante, p. 100.

(i) *Bagnall v. Andrews*, 7 Bing. 217, E. C. L. R. vol. 20; 4 Moo. & P. 839, S. C.

(k) *Ex parte Marshall*, 1 Atk. 262; *Jones v. Brooke*, 4 Taunt. 464; *Stratton v. Mathews*, 18 L. J. 5, Ex.; 3 Exch. Rep. 48,* S. C.; *Garrard v. Cottrell*, 10 Q. B. Rep. 679, E. C. L. R. vol. 59.

(1) A person who makes or indorses an accommodation note, for the accommo-

But an accommodation acceptor has no right to charge the party accommodated with the costs of an action, to which the accommodation acceptor had evidently no defence.^(l)

An action not only lies on a bill, but for a bill. Trover or detinue may be brought.

Trover will lie at the suit of one who is no party to the bill,^(m) or at the suit of the payee or acceptor, against a defendant to whom the plaintiff's agent has wrongfully assigned it, though the defendant has a right of action on the bill against the agent.⁽ⁿ⁾

In an action of trover, a verdict may in all cases be given for the full amount of the bill; but if the defendant deliver up the bill, nominal damages may be entered on the record.^(o)

[*324] *A recovery in an action of trover, and payment of the damages, divests the property out of the plaintiff, and vests it in the defendant,^(p) as against the plaintiff. And that from the period of the conversion.^(q)

If a plaintiff fail on an action of trover, he may nevertheless apply to a Court of equity to have the bill delivered up.^(r)

A defendant cannot now be arrested on a bill of exchange, unless the cause of action amounts to 20*l.*, and there be probable cause for believing that he is about to quit England.^(s)

(*l*) Roach v. Thompson, M. & M. 487; Beech v. Jones, 5 C. B. Rep. 696, E. C. L. R. vol. 57.

(*m*) Treuttel v. Barandon, 8 Taunt. 100, E. C. L. R. vol. 4; 1 Moore, 543, S. C.

(*n*) Goggerley v. Cuthbert, 2 N. R. 170; Evans v. Kymer, 1 B. & Ad. 528, E. C. L. R. vol. 20; see Cranch v. White, 1 Bing. N. C. 414, E. C. L. R. vol. 27; 1 Scott, 314; 6 C. & P. 767, S. C.

(*o*) Ibid. As to the interest recoverable in trover, see the Chapter on *Interest*.

(*p*) See Holmes v. Wilson, 10 Ad. & E. 511, E. C. L. R. vol. 37; Cooper v. Wilomatt, 1 C. B. 672, E. C. L. R. vol. 50.

(*q*) Cooper v. Shepherd, 3 C. B. 266, E. C. L. R. vol. 54.

(*r*) Lisle v. Liddle, 3 Anstr. 649.

(*s*) 1 & 2 Vict. c. 110, s. 3.

dition of a party thereto, is regarded as a surety, and can charge such a party with the costs of a suit for the collection of the note, which he has been compelled to pay. Baker v. Martin, 3 Barb. Sup. Ct. Rep. 634.

Under the old law, where a party was to be arrested on a bill or note, some material points were to be attended to in the affidavit to hold to bail. "The strictness required in these affidavits," says Lord Ellenborough, "is not only to guard defendants against perjury, but also against any misconception of the law by those who make affidavits; and the leaning of my mind is always to great strictness of construction, where one party is to be deprived of his liberty by the act of another."^(t) And these precautions are still necessary where the plaintiff arrests under the late statute.

A man could not have been arrested for interest on a bill unless made payable on the face of the bill.^(u)

The affidavit must, therefore, have stated the sum for which the bill was drawn.^(v)

It was necessary in all cases, even in an action against an indorser or drawer, though they could not otherwise have become indebted, to state that the bill was due,^(w) or, at least, to show the date, and when it was payable.^(x)

*The affidavit need not have stated all the intervening indorsements mentioned in the declaration,^(y) but it must have [*325]

(t) *Taylor v. Forbes*, 11 East, 315.

(u) *Latraille v. Hoepfner*, 10 Bing. 334, E. C. L. R. vol. 25; 3 M. & Sc. 800, S. C.; *Hutchinson v. Hargrave*, 1 Bing. N. C. 369, E. C. L. R. vol. 27.

(v) *Brook v. Coleman*, 2 D. P. C. 7; 1 C. M. 622, E. C. L. R. vol. 41; *Westmacott v. Cook*, 2 Dow. 519, overruling *Hanley v. Morgan*, 2 C. & J. 331; * 1 Dowl. 322, S. C.; *Lewis v. Gompertz*, 2 C. & J. 352; * 1 Dowl. 319, S. C. It need not state notice of dishonor. *Banting v. Jadis*, 1 Dowl. P. C. 445; *Cross v. Morgan*, *Ibid.* 122; *Buckworth v. Levy*, 7 Bing. 251, E. C. L. R. vol. 20; 5 M. & P. 23, S. C.; 1 D. P. C. 211, S. C.

(w) *Edwards v. Dick*, 3 B. & Ald. 495, E. C. L. R. vol. 5, overruling *Davison v. March*, 1 N. R. 157; *Kirk v. Almond*, 2 C. & J. 354; * 1 Dowl. 318, S. C.; and see *Holcombe v. Lambkin*, 2 M. & Sel. 475, and *Machu v. Fraser*, 7 Taunt. 171, E. C. L. R. vol. 2; *Jackson v. Yate*, 2 M. & Sel. 148.

(x) *Shirley v. Jacobs*, 3 Dowl. 101; *Phillips v. Turner*, 1 C. M. & R. 597; * 3 Dowl. 163, S. C. It has been held insufficient to allege in an affidavit against the drawer, that the acceptor made default. *Caunce v. Rigby*, 3 Mees. & W. 67; * but see *Witham v. Gompertz*, 2 C. M. & R. 736; * and see *Crosby v. Clarke*, 1 M. & W. 296. * The presentment and default should be especially alleged. *Buckworth v. Levy*, 7 Bing. 251, E. C. L. R. vol. 20; 5 M. & P. 23; 1 Dowl. 211, S. C.; *Simpson v. Dick*, 3 Dowl. 731; *Banting v. Jadis*, 1 Dowl. 445.

(y) *Luce v. Irwin*, 3 M. & W. 27. *

stated by whom the bill was indorsed, and it was not sufficient to state that it was duly indorsed.(z)

The affidavit must also have shown in what character the defendant became a party to the bill or note, whether as drawer, indorser, or acceptor.(a) Thus, where, in a recent case, the affidavit to hold to bail stated the defendant to be duly indebted to the plaintiff upon a promissory note for 10,000*l.*, drawn in favor of A. B., and duly indorsed to the plaintiff, though it was urged that an indorsement by the defendant was implied by the word duly, the Court held the affidavit insufficient, and set aside the bail bond.(b)

But it is not clear that it need have specified in what character the plaintiff sued.(c)

It was, formerly, not sufficient to state merely the initials of the Christian name of the defendant, though the initials only appeared on the bill, and though due inquiry had been made to ascertain his name without effect.(d)

But now it is enacted by 3 & 4 Wm. 4, c. 42, s. 12, that in all actions upon bills of exchange or promissory notes, or other written instruments, the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient, in every affidavit, to hold to bail, and, in the [*326] process or *declaration, to designate such persons by the same initial letter or letters, or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full.(e)

(z) *Lewis v. Gompertz*, 2 C. & J. 352; * 1 Dowl. 319, S. C.; *M'Taggart v. Ellice*, 4 Bing. 114, E. C. L. R. vol. 13; 12 Moore, 326, S. C.

(a) *Humphries v. Winslow*, 2 Marsh. 231; 6 Taunt. 531, E. C. L. R. vol. 1, S. C.

(b) *M'Taggart v. Ellice*, 4 Bing. 114, E. C. L. R. vol. 13; 12 Moore, 326, S. C.; *Lewis v. Gompertz*, 2 C. & J. 352; 1 Dowl. 319, S. C. See *Harrison v. Rigby*, 3 Mees. & W. 66; * 6 Dowl. 93, S. C.

(c) *Bradshaw v. Saddington*, 7 East, 94; 3 Smith, 117, S. C.; *Balbi v. Batley*, 1 Marsh. 424; 6 Taunt. 25, E. C. L. R. vol. 1, S. C.; *Machu v. Fraser*, 7 Taunt. 171, E. C. L. R. vol. 2; *Lamb v. Newcomb*, 5 Moore, 14; 2 B. & B. 343, E. C. L. R. vol. 6, S. C.; *Warmsley v. Macey*, 2 B. & B. 338, E. C. L. R. vol. 6; 5 Moore, 52, S. C. See *Mammatt v. Mathew*, 10 Bing. 506; E. C. L. R. vol. 25.

(d) *Reynolds v. Hankin*, 4 B. & Ald. 537, E. C. L. R. vol. 6; overruling *Howell v. Coleman*, 2 B. & P. 466; and see *Coles v. Gum*, 1 Bing. 424, E. C. L. R. vol. 8; 8 Moo. 526, S. C.

(e) *Esdaile v. McLean*, 15 M. & W. 277.* Before this statute it had been pro-

The affidavit need not state whether the bill be foreign or inland. *(f)*

Where the action is between immediate parties, so that the plaintiff can recover on the consideration, it should be stated in the affidavit; for, otherwise, should the plaintiff fail on the count of the bill, and recover on a count on the consideration, the bail will be discharged. *(g)*

An accommodation acceptor may hold the drawer to bail for costs of an action brought against the acceptor. *(h)*

The affidavit may be good in part and bad in part. *(i)*

The plaintiff may lay the venue in any county, and the Court will not change it at the instance of the defendant, except upon very special ground. *(k)* This rule applies to actions on specialties, bills, and notes, and not to actions on other written contracts. *(l)* A banker's check is a bill of exchange within the rule. *(m)*

Where a special ground is laid for inspection, the Courts will oblige the plaintiff to allow the defendant to inspect the bill or note on which the action is brought. *(n)*

It has been held, that where particulars of the plaintiff's demand are given, and they do not state the consideration paid for the instrument, such particulars will preclude the plaintiff from giving the consideration in evidence, should he fail on the special count. *(o)* [*327]

vided by R. Hil. 2 Wm. 4, R. 32, that a description of the defendant in the process or affidavit by his initials or a *wrong* name, or without a Christian name, should not entitle him to a discharge, provided due diligence had been used to obtain a knowledge of his true name. *(f)* Phillips v. Don, 18 L. J. Q. B. 104.

(g) Wheelwright v. Jutting, 7 Taunt. 304, E. C. L. R. vol. 2; 1 Moore, 51, S. C.; Levy v. Webb, 9 Q. B. 427, E. C. L. R. vol. 58; and see Caswell v. Coare, 2 Taunt. 107; and Wilks v. Adock, 8 T. R. 27; Edge v. Frost, 4 D. & R. 245, E. C. L. R. vol. 16.

(h) Stratton v. Mathews, 18 L. J. 5, Exch. 48,* S. C.

(i) Cunliffe v. Maltass, 18 L. J. 233, C. P.; 7 C. B. Rep. 795, E. C. L. R. vol. 62.

(k) Tidd's Practice, 604.

(l) Mondel v. Steele, 8 M. & W. 640.*

(m) Webb v. Inwards, 17 L. J. 157, C. P.; 5 C. B. Rep. 483, E. C. L. R. vol. 57, S. C.

(n) Threlfal v. Webster, 1 Bing. 161, E. C. L. R. vol. 8; 7 Moo. 559, S. C.; Tidd, 591; Blogg v. Kent, 6 Bing. 614, E. C. L. R. vol. 19; 4 Moo. & P. 433, S. C. See the Chapter on *Forgery*; and Thomas v. Dunn, 6 M. & G. 274, E. C. L. R. vol. 46.

(o) Wade v. Beasley, 4 Esp. 7.

Plaintiff may recover on a bill set out in the declaration, though not mentioned in the particulars, *(p)* unless the form of the particulars preclude him.

Particulars, which state the amount of the common counts to be an amount secured by a promissory note, on which note there is a special count, make it necessary to prove the note, in order to recover on the common counts. *(q)* Particulars are not evidence; they are only an explanation of the declaration or plea. *(r)*

A tender, after the bill became due, is no defence by the acceptor. *(s)* But a drawer or indorser may, perhaps, tender within a reasonable time after request. *(t)*

A tender should be unconditional; the party making it cannot require a receipt as a condition precedent, without invalidating the tender. But if the tender be objected to on other grounds, the requisition of a receipt becomes immaterial. *(u)*

The Courts will sometimes consolidate actions on bills where the parties and the question to be tried in each action are the same. *(v)*

If the holder bring concurrent actions against the acceptor, the drawer and the indorsers, the Court will stay the proceedings in any one of those actions, on payment of the amount of the bill and costs in that particular action.

But they would not, until recently, have stayed proceedings in an action against the acceptor, except upon the terms of his paying the costs in all the other actions, he being the original defaulter. *(w)* For, though no action lies against the acceptor for these costs, *(x)* yet, when he came to ask a favor as a stay of proceedings, the Court [*328] might with propriety have *put him under terms. Now, however, by a late rule of all the Courts, it is ordered that in any

(p) Cooper v. Amos, 2 Car. & Pa. 267, E. C. L. R. vol. 12.

(q) Roberts v. Ellsworth, 10 M. & W. 653.*

(r) Burkett v. Banchard, 3 Exch. Rep. 89.* *(s)* Hume v. Peploe, 8 East, 168.

(t) Walker v. Barnes, 5 Taunt. 240, E. C. L. R. vol. 1; 1 Marsh. 36, S. C. See ante, 176; but see Siggers v. Lewis, 1 C. M. & R. 370; 2 Dowl. 681, S. C.

(u) Cole v. Blake, Peake, N. P. C. 179; Richardson v. Jackson, 8 M. & W. 298.*

(v) Booth v. Payne, 11 L. J., Exch. 256; and see Sharp v. Lethridge, 4 M. & Gr. 37, E. C. L. R. vol. 43.

(w) Smith v. Woodcock, 4 T. R. 691; Windham v. Wither, 1 Str. 515; Golding v. Grace, 2 Bla. 749. See Lewis v. Dalrymple, 3 Dowl. P. C. 433.

(x) Dawson v. Morgan, 9 B. & C. 618, E. C. L. R. vol. 17.

action against the acceptor of a bill or maker of a note, the defendant may stay proceedings, on payment of debt and costs in that action only.(y)

And where, in an action against the acceptor, an attachment has been obtained against the sheriff for not bringing in the body, the sheriff may be relieved on the payment of the costs of that action only.(z) And before the late rule, if the actions commenced against the other parties were merely collusive, in order to charge the acceptor with a heavier sum for costs, proceedings against him might have been stayed without payment of those costs.(a)

If the bill or note were obtained by the plaintiff from the defendant without consideration, on affidavit to that effect by the defendant the Court will stay the proceedings; but, where there are contradictory affidavits, the Court will not interfere in this summary way, but put the defendant to insist on it as a defence on the trial.(b) Where an indorsement was made on a promissory note by the plaintiff, the payee, that if the interest were paid on stipulated days during her life, the note should be given up, the Court refused to stay proceedings on payment of interest and costs.(c)

A plea clearly frivolous on the face of it, or tricky and false, will be set aside.(d)

In ordinary cases, if the plaintiff proceed in assumpsit, and the defendant suffer judgment to go by default, the Court may assess the damages.(e) But, in order to inform the conscience of the Court, a writ of inquiry is commonly issued.(f)

(y) R. T. T. 1 Vict.

(z) *Rex v. Sheriffs of London*, 2 B. & Ald. 192; *Vaughan v. Harris*, 3 Mees. & W. 542.*

(a) *Hodson v. Gunner*, 2 D. & R. 57, E. C. L. R. vol. 16.

(b) *Turner v. Taylor*, Tidd's Pr. 9th ed. 530.

(c) *Steel v. Bradfield*, 4 Taunt. 227.

(d) *Horner v. Keppel*, 10 Ad. & E. 17, E. C. L. R. vol. 37; 3 P. & D. 234, S. C.; *Mitford v. Finden*, 8 M. & W. 511; * *Knowles v. Burward*, 10 A. & E. 19, E. C. L. R. vol. 37; 2 Per. & Dav. 235, S. C.

(e) 1 Tidd, 9th ed. 570.

(f) It was formerly held that, unless upon a writ of inquiry, the plaintiff produced the bill, he could recover only nominal damages. *Marshall v. Griffin*, R. & Moo. 41. But now upon a writ of inquiry, it is not necessary to produce the bill. *Lane v. Mullins*, 1 Gale & Dav. 712; 2 Q. B. 254, E. C. L. R. vol. 42, S. C.; *Davis v. Barker*, 3 C. B. Rep. 606. See post, Chapter on *Evidence*.

In actions on bills or notes, however, it is the practice of the plaintiff, instead of executing a writ of inquiry, to apply *to the [*329] Court, in Term, or to a Judge in Vacation, on an affidavit of the nature of the action, for a rule or summons to show cause why it should not be referred to the Master, to see what is due for principal and interest, and why final judgment should not be signed for that sum, without executing a writ of inquiry, upon which the Court or Judge will make the rule absolute, on an affidavit of service, unless good cause be shown to the contrary.

Upon service of a copy of this rule, it is not necessary to show the original, unless sight of it be demanded. (ff) Where there are three joint makers of a note, service on two is sufficient. (g)

The defendant cannot show for cause against this rule an irregularity in the proceedings; (h) but he may bring forward, before the Master, facts which go to reduce the sum recoverable; and, therefore, due notice should be given him of the Master's appointment. (i)

A rule to compute may be obtained, though the bill or note have been destroyed or lost, so that a copy only can be produced. (k)

Re-exchange is the expense incurred by the bill being dishonored in a foreign country, in which it was payable, and returned to the country in which it was made or indorsed, and there taken up; the amount of it depends on the course of exchange between the two countries. The nature of the transaction is this: a merchant in London draws on his debtor in Lisbon a bill in favor of A., for so much in the currency of Portugal, for which he receives of A. its corresponding value at the time, in English currency. Sometimes a bill for that amount, in Portuguese currency, can be purchased in London for less, sometimes it will fetch more English money, according to the course of exchange. Suppose the rate of exchange to fall when the bill becomes due; that is, suppose it requires in London

(ff) R. Hil. T. Wm. 4, r. 51.

(g) *Figgins v. Ward*, 2 C. & M. 424; * *Carter v. Southall*, 3 Mees. & W. 128; * *Amlot v. Evans*, 7 M. & W. 462.*

(h) *Pell v. Brown*, 1 B. & P. 369; *Marryat v. Winkfield*, 2 Chitty, R. 119.

(i) But it seems that such notice is not essential in Q. B. or Exchequer. See *Huckfield v. Kendall*, 1 Chit. R. 693. This rule may be obtained, although the bill be destroyed or lost. *Clarke v. Quince*, 3 Dowl. 26; *Brown v. Messiter*, 3 M. & Sel. 281; *Allen v. Miller*, 1 Dowl. 420.

(k) *Brown v. Messiter*, 3 M. & S. 281; *Clarke v. Quince*, 3 Dowl. 26; *Allen v. Miller*, 1 Dowl. 420; *Flight v. Browne*, Tyr. 312; *Warren v. Woods*, C. P., Hil. T. 1850.

more English money to purchase a bill on Lisbon for the same sum, and that, in Lisbon, to replace it, a larger bill must be drawn on London. A., the holder, has a right to the payment of that sum in *Portuguese currency at Lisbon. The bill is dishonored; he, the holder, is, therefore, entitled to recover of the drawer, not only the value which he formerly gave for the bill, but as much as he must draw a bill for in Lisbon, on London, in order to replace, at the time and on the spot, when and where the bill should have been paid, the sum that he was entitled to receive.^(l) The drawer of a bill is liable to the re-exchange, though the bill be returned through never so many hands.^(m) But the acceptor is not liable to the re-exchange.⁽ⁿ⁾ [*330]

Other damages not necessarily arising from the dishonor, as noting, postages, &c., are not recoverable, unless specially stated in the declaration.^(o) But it has been held that postage is recoverable under the count for money paid.^(p)

When a bill is dishonored, the owner has his option to sue on the bill, or on the consideration. It is advisable to sue on the bill; first, because it reduces the debt to a certainty; secondly, because less evidence is necessary; thirdly, in an action on the bill, proof of payment of the bill lies on the defendant; but in an action on the consideration only, if defendant show that a bill was given, plaintiff must prove that that bill was *not* paid.^(q)

Of course it is best, where possible, to join a count on the bill with a count on the consideration;^(r) and the plaintiff may take a verdict on both counts.^(s)

(l) *De Tastet v. Baring*, 11 East, 265; 2 Camp. 65, S. C.

(m) *Mellish v. Simeon*, 2 H. Bla. 378.

(n) *Napier v. Schneider*, 12 East, 420; *Woolsey v. Crawford*, 2 Camp. 445.

(o) *Kendrick v. Lomax*, 2 C. & J. 405; * 2 Tyr. 438, S. C. In which case it was held, that the bill having been renewed, the plaintiff could not recover the charges on the first bill while the second bill suspended the remedy on it. It seems doubtful whether the expense of noting an inland bill not protested can in any case be recovered. *Ibid.*

(p) *Dickinson v. Hatfield*, 1 M. & Rob. 141; 5 Carr. & P. 46. The defendant, in this case, directed the plaintiff to charge him with it. See the Chapter on *Protest*. As to nominal damages, see *Beaumont v. Greathead*, 2 C. B. Rep. 495, E. C. L. R. vol. 52.

(q) *Hebden v. Hartsink*, 4 Esp. 46; *Bishop v. Rowe*, 3 M. & Sel. 362.

(r) A count on the consideration may still be joined, R. Hil. 4 W. 4, R. 5. And a count on an account stated in all cases.

(s) *Vide ante*, p. 322.

It would be foreign to the object of this little work to discuss, at length, the jurisdiction and proceedings of Courts of Equity in relation to actions on bills. The following general observations may nevertheless be made.

A Court of Equity will, under certain circumstances, restrain an action on a bill.(*t*)

[*331] *A plaintiff may, where it is necessary, file a bill of discovery in aid of an action on a bill, or of an action relating to the proceeds of bills.(*u*)

If the defendant in equity be interrogated as to the consideration for the bill, he must answer not only as to the consideration given by himself, but as to that given by other parties to his knowledge.(*v*) No bill can be filed for discovery, if it charge the defendant with a crime.(*w*)

But the former Gaming Act, 9 Anne, c. 14, s. 3,(*x*) and the Stock Jobbing Act, 7 Geo. 2, c. 8, s. 2, deprive defendants of this protection in matters to which those Acts relate.(*y*)

[*332] *CHAPTER XXXIII.

OF THE PLEADINGS IN ACTIONS ON BILLS AND NOTES.

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(*t*) See *Queen of Portugal v. Glynn*, 1 West, 258; *Glynn v. Soares*, 3 M. & K. 450; *Hodgson v. Murray*, 2 Sim. 515; *Hood v. Ashton*, 1 Russ. 412; *Kidson v. Delworth*, 5 Price, 564.

(*u*) See *Thomas v. Taylor*, 3 Y. & C. 255;* *Wilkinson v. Leaugier*, 2 You. & C. 366,* or of a defence to an action.

(*v*) *Glendall v. Edwards*, 2 You. & Col. 125;* and see *Culverhouse v. Alexander*, 2 You. & Col. 218.*

(*w*) *Fleming v. St. John*, 2 Sim. 181; *Whitmore v. Francis*, 8 Price, 616; 2 Sim. 182.

(*x*) Now repealed by 8 & 9 Vict. c. 109.

(*y*) See *Wilkinson v. Leaugier*, 2 Y. & C. 366;* *Bullock v. Richardson*, 14 Vesey, 378; *Rawlings v. Hall*, 1 C. & P. 11, E. C. L. R. vol. 12; *Thomas v. Newton*, 2 C. & P. 606, E. C. L. R. vol. 12.

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To enter on the subject of pleading and evidence in detail would be foreign to the object of this little work. Many points, both of pleading and evidence, have already been discussed in the foregoing Chapters. And the decisions, on the law of pleading in actions on bills of exchange, since the New Rules, have not been sufficiently numerous to remove every obscurity from that branch of the law. These considerations may, perhaps, bespeak the candor of the reader for the deficiencies of the present and the next Chapter.

Two forms of action in the superior Courts may be brought on a bill or note, *debt* and *assumpsit*.

*But *debt* is of a limited application, and will only lie where there is a privity of contract between the parties. (a) It will, therefore, lie at the suit of the drawer against the acceptor: (b) by the payee against the drawer of a bill or check, (c) or maker of a note: (d) by first indorsee against the drawer of a bill payable to his own order: (e) and in all cases by indorsee against his immediate indorser. (f) It has been doubted whether an action of debt may not be maintained by the payee against the acceptor, though the payee

(a) *Lewin v. Edwards*, 9 M. & W. 720.*

(b) *Priddy v. Henbrey*, 1 B. & C. 674, E. C. L. R. vol. 8; 3 Dowl. & R. 165.

(c) *Simpkins v. Potecary*, 19 L. J. 242, Ex.

(d) *Bishop v. Young*, 2 B. & P. 78; *Hodges v. Stewart*, Skin. 346; 12 Mod. 36; 1 Salk. 125, S. C.

(e) *Stratton v. Hill*, 3 Price, 253.

(f) *Watkins v. Wake*, 7 M. & W. 490; * see *Hodges v. Stewart*, Skin. 346.

be not the drawer: *(g)* but it is conceived that no one but the drawer of a bill payable to his own order can sue the acceptor in debt. *(h)*

On a promissory note payable by instalments, debt will not lie till the last day of payment be past; *(i)* because the different instalments are considered to constitute but one debt, and for one debt the plaintiff can bring but one action of debt, and cannot split his demand and vex the debtor with a multitude of suits. *(k)*

To compensate for these disadvantages, the action of *debt* has some recommendations: and, in the first place, the judgment in the first instance is not interlocutory, but final, so that, after judgment by [*334] default, the plaintiff need not execute a writ of **inquiry*, or refer to the Master, to compute principal and interest. Secondly, the Court cannot, in any case, dispense with bail, if a writ of error be brought. At common law, no bail in error was necessary; but the 3 Jac. 1, c. 8, required it before any execution could be stayed on error on *any* judgment in debt for a specific sum of money. Then the 13 Car. 2, c. 2, and the 16 & 17 Car. 2, c. 8, required it on any judgment *after verdict* in any personal action. Till the late statute, therefore, bail in error was necessary on all judgments in an action of debt for a specific sum of money, but not on judgments, except after verdict—that is, not on judgment *by default*, on *demurrer*, or on *nul tiel record*, in an action of *assumpsit*. The defendant

(g) See a learned note to Chitty on Bills, 9th ed. p. 690.

(h) Bishop v. Young, 2 B. & P. 78; Cloves v. Williams, 3 Bing. N. C. 868, E. C. L. R. vol. 32; 5 Scott, 68, S. C.; Powell v. Ancell, 3 M. & G. 171, E. C. L. R. vol. 42. And it was once supposed that it would not lie unless the words “*value received*,” or some expression of the consideration, appeared on the face of the instrument. Bishop v. Young, 2 B. & P. 78; Priddey v. Henbrey, 1 B. & C. 674, E. C. L. R. vol. 8; 3 Dowl. & R. 165, S. C.; Cresswell v. Crisp, 2 Dowl. P. C. 635; 2 C. & Mees. 634,* S. C. But it is now clear that debt will lie, though the words “*value received*” be not on the bill. Hatch v. Traves, and Watson v. Kightley, 11 Ad. & E. 702, E. C. L. R. vol. 39; 3 Per. & D. 408, S. C.

(i) Rudder v. Price, 1 H. Bl. 547.

(k) Baylye v. Hughes, Cro. Car. 137; Pemberton v. Shelton, Cro. Jac. 498; Hunt v. Braines, 4 Mod. 402; Hulme v. Sanders, 10 Mod. 69; 2 Lev. 4; 1 Wms. Saun. 201, a.; Clun's case, 10 Rep. 127. But if a note be payable by instalments on the face of it, an action of *assumpsit* lies for each instalment. If, however, the note is payable by instalments, *but not on the face of it*, only one action of *assumpsit* lies; and though in such a case a *cognovit* be taken for the amount of the first instalment only, the note is discharged. Siddall v. Rawcliffe, 1 C. & M. 487;* 1 M. & Rob. 263, S. C. Wager of law is now abolished (3 & 4 Wm. 4, c. 42, s. 13), and debt on simple contract now lies against an executor or administrator (3 & 4 Wm. 4, c. 42, s. 14).

in assumpsit might, and, accordingly, often did suffer judgment by default, in order to bring a writ of error without bail, for the mere purpose of delay. But now the 6 Geo. 4, c. 96, requires special bail in error on any judgment in any personal action, unless dispensed with by leave of the Court or a Judge. This leave cannot be given in the action of debt, the statute 3 Jac. 1, c. 8, being still in force, but may be given after judgment, in assumpsit, by default, on demurrer, or on *nul tiel* record, for to these cases no other statute applies. But, as it is not likely that the Judges will lend their sanction to vexatious and dilatory writs of error, the practical effect of the 6 Geo. 4, c. 96, has been to remove a ground of preference which before existed for the action of debt. A promissory note not being an instrument on which debt could have been brought when the 3 Jac. 1, c. 8, was passed, it is not within that statute; and, consequently, leave may be obtained to bring a writ of error without bail on a judgment in debt on a note; ^(l) on a count for goods sold and delivered; or on an *insimul computassent*. ^(m) And, if there be one count in a declaration on which judgment is entered upon a cause of action, for which debt would not lie at the time of the statute of James, bail in error may, by leave of the Court, be dispensed with. ⁽ⁿ⁾ When a Court of Error gives judgment for the defendants in error, it must give interest for such time as the execution has been delayed by the writ of error. ^(o)

The forms of declarations given by the Judges are applicable in debt as well as in assumpsit, and where between intermediate parties, may be joined with a count in debt. ^(p)

The action of assumpsit, on account of its universal *applicability, is by far the most usual remedy on a bill or note. [*335]

Most of the following observations are applicable alike to the action of debt, and to the action of assumpsit.

It will be convenient to exhibit the decisions on points of pleading, in the order indicated by the several stages of the pleadings. First, therefore, of the declaration.

It was formerly usual to state that the parties to a bill were mer-

^(l) *Trier v. Bridgman*, 2 East, 359.

^(m) *Ibid.*

⁽ⁿ⁾ *Ibid.*; *Webb v. Geddes*, 1 Taunt. 540.

^(o) 3 & 4 Wm. 4, c. 42, s. 30.

^(p) *Compton v. Taylor*, 4 M. & W. 138; * *Cloves v. Williams*, 3 Bing. N. Ca. 868, E. C. L. R. vol. 32; 5 Scott, 68, S. C.

chants, or persons engaged in commerce, and that the bill was drawn according to the custom of merchants. But such a statement, and, indeed, any reference whatever to the custom of merchants, which custom is parcel of the common law of the land, is unnecessary, and is now disused.

In an action against the acceptor on a bill drawn by a firm, it is a sufficient description of the drawers to say that certain persons under the name, style, and firm of A. & Co., made their bill of exchange.(q) A declaration stating that A. B. drew a bill requiring defendant to pay to the drawer's order, without again naming him, is good,(r) or to his order, the word *his*, referring to the drawer.(s)

In all actions on bills or notes, where any of the parties are designated on the instrument by the initial letter, or some contraction of the Christian name, it is sufficient so to describe them in the process and declaration.(t)(1) A single letter, where it is a vowel, may, on special demurrer, be assumed to be a Christian name;(u) but not if a consonant.(v)

In a declaration by a public officer of a banking copartnership, established under the 7 Geo. 4, c. 46, it is sufficient to describe the plaintiff as a public officer duly appointed.(w)

(q) *Tigar v. Gordon*, 11 L. J. 279, Exch.; 9 M. & W. 347.* It had been held insufficient to describe the drawers as certain persons using the name, &c. *Ball v. Gordon*, Ibid. 221, and 9 M. & W. 345,* S. C.; sed quære, see *Smith v. Ball*, 9 Q. B. Rep. 361, E. C. L. R. vol. 58, and *Bass v. Clive*, 4 Camp. 78; 4 M. & Sel. 13, S. C.; *Schultz v. Astley*, 7 C. & P. 99, E. C. L. R. vol. 32; 2 Bing. N. Ca. 544, S. C.; 2 Scott, 815.

(r) *Knill v. Stockdale*, 6 M. & W. 478.*

(s) *Spyer v. Thelwell*, 2 C. M. & R. 692;* 4 Dowl. 509, S. C.

(t) 3 & 4 Wm. 4, c. 42, s. 12. But it must appear on the count that they are so described in the instrument itself. *Levy v. Webb*, 9 Q. B. Rep. 427, 442, E. C. L. R. vol. 58; *Gatty v. Field*, Ibid.; *Esdaile v. M'Clean*, 15 M. & W. 277;* or the declaration is specially demurrable: *Miller v. Hay*, 3 Exch. Rep. 14;* *Turner v. Fitt*, 3 C. B. Rep. 70; unless the full Christian name could not be discovered. *Lomax v. Landells*, 6 C. B. Rep. 583, E. C. L. R. vol. 60.

(u) *Lomax v. Landells*, 18 L. J. 88, C. P.; 6 C. P. Rep. 583, E. C. L. R. vol. 25, S. C.

(v) *Kinnersley v. Knott*, 7 C. B. Rep. 980, E. C. L. R. vol. 62.

(w) *Spiller v. Johnson*, 6 M. & W. 570;* *Christie v. Peart*, 7 M. & W. 491.*

(1) When a bill of exchange is payable to and indorsed by a firm, the indorser in declaring on it need not set forth the names of the members of the firm. *Haviland v. Simons*, 4 Richardson, 338.

*The instrument may be described, either by setting it out in hæc verba ;(*x*) or by stating its legal effect. If it be drawn [*336] in a foreign language, it may be set out in English.(*y*) It is neither necessary nor safe to aver that the instrument bore date on a certain day, for such an averment, if incorrect, being matter of description, would be a variance.(*z*) The safe and usual mode of declaring is, to allege that A. B. on such a day made his bill; for the day alleged not then being part of the description of the instrument, a making on any day may be proved. Since, however, the recent statutes of amendment, this precaution has become less important.

In a declaration on a joint and several promissory note, it is not improper to state, that the makers, jointly or separately, promised to pay.(*a*) When a bill is made payable at usance, the length of the usance must be stated.(*b*) Where an instrument has been made payable to husband and wife, and the husband sues upon it alone, it may be stated in the declaration to have been made payable to the husband.(*c*)

A bill drawn upon A. B. and C. may be described as drawn on A. and B.(*d*)

For the proper mode of stating the acceptance of a bill of exchange in pleading, the reader is referred to the Chapter on ACCEPTANCE.

For the proper mode of pleading a presentment for payment, the reader is referred to the Chapter on that subject.

The omission to state notice of dishonor is not cured by verdict.(*e*)

(*x*) Except in cases where that would mislead, as where a bill is drawn payable in a foreign currency of the English denomination, but of a different value. *Kearney v. King*, 2 B. & Ald. 301; *Sprowle v. Legge*, 1 B. & C. 16, E. C. L. R. vol. 8; 2 D. & Ry. 15, S. C.; see *Taylor v. Booth*, 1 C. & P. 286, E. C. L. R. vol. 12; *Harington v. McMorris*, 5 Taunt. 228, E. C. L. R. vol. 1; 1 Marsh. 33, S. C.; *Simmonds v. Parminster*, 1 Wils. 185; 4 Bro. P. C. 604; *Stevenson v. Oliver*, 8 M. & W. 234.*

(*y*) *Attorney-General v. Valabreque*, Wightw. 9.

(*z*) *Anon.* 2 Camp. 308, n.

(*a*) *Rees v. Abbott*, Cowp. 832; *Butler v. Malissy*, 1 Stra. 76; and see *Neale v. Ovington*, 2 Ld. Raym. 1544.

(*b*) *Buckley v. Cambell*, 1 Salk. 131; *Meggadow v. Holt*, 12 Mod. 15; 1 Show. 317, S. C.

(*c*) *Ankerstein v. Clarke*, 4 T. R. 616.

(*d*) *Evans v. Lewis*, 1 Wms. Saund. 291, d.; *Mountstephen v. Brooke*, 1 B. & A. 224; see *Wilson v. Reddall*, Gow. 161.

(*e*) *Rushton v. Aspinall*, Doug. 654.

It was formerly considered doubtful, *(f)* whether such facts [**337*] **as* dispense with presentment, protest, or notice of dishonor, could, or could not, be given in evidence, in support of the common allegations of presentment, protest, or notice, in the declaration. It is now, however, clear, that facts dispensing with presentment or notice, such as absence of effects in the drawee's hands, or a countermand of payment by the drawer, must be specially alleged in the declaration; and that proof of those facts is inadequate to the support of a positive averment of presentment, protest, or notice. *(g)* (1) A promise to pay, however, is still admissible under the common averments as *prima facie* evidence, that the preliminaries essential to the maintenance of the action, such as presentment and notice, have been satisfied. *(h)* But if it should distinctly appear in evidence, that there has been a neglect to present, and that the defendant, being aware of the omission, afterwards promised to pay, so that the promise is used as a waiver, it is conceived that the declaration must still be special. It may be otherwise, where there has been a neglect to give notice of dishonor, and a promise to pay, with notice of the omission, has been afterwards made before action brought, for then the defendant has, in the words of the declaration, had notice of the dishonor, which notice, under the circumstances, may be deemed as against him due notice. But the law on this subject does not appear to be very clearly settled. *(i)* It seems, however, that notice too late in the usual course, but reasonable and sufficient under the special circumstances, may be proved under the ordinary allegation. *(k)*

(f) Cory v. Scott, 3 B. & Ald. 619, E. C. L. R. vol. 5; Bayley on Bills, 5th ed. 406.

(g) Burgh v. Legge, 5 M. & W. 418; **see* Terry v. Parker, 6 Ad. & E. 502, E. C. L. R. vol. 33; 1 N. & P. 752, S. C.; Carter v. Flower, 16 M. & W. 749. ***

(h) See Hopley v. Dufresne, 15 East, 275; Lundie v. Robertson, 7 East, 231; 3 Smith, 225, S. C.; Hicks v. Duke of Beaufort, 4 Bing. N. Ca. 229, E. C. L. R. vol. 33; 5 Scott, 593, S. C. See the Chapter on *Presentment for Payment*.

(i) See Brownell v. Bonney, 1 Q. B. Rep. 39, E. C. L. R. vol. 41; 3 M. & Ry. 359; Dans. & Ll. 151, S. C.; Firth v. Thrush, 8 B. & C. 387, E. C. L. R. vol. 15; Baldwin v. Richardson, 1 B. & C. 245, E. C. L. R. vol. 8; 2 D. & Ry. 285, S. C.; *ante*, p. 238.

(k) Carter v. Flower, 16 M. & W. 749. ***

(1) Facts which excuse demand and notice may be proved, in an action against an indorser, under a declaration in the usual form. Kennon v. McRea, 7 Porter, 175; *Contra*: Curtis v. State Bank, 6 Blackford, 312; Windham Bank v. Norton, 22 Connecticut, 213.

In an action against an indorser, proof of a waiver of notice will support an allegation of actual notice. Taunton Bank v. Richardson, 5 Pick. 436.

It is not necessary to allege a notice to the defendant of the indorsement on a bill or note, and if the declaration contain such a statement, it cannot be traversed.^(l)

As to the mode of pleading a protest, see the former Chapter on PROTEST AND NOTING.

The forms of declarations on bills of exchange, propounded by the Judges, having been settled before the passing *of the Uni-^[*338]formity of Process Act, the 2 Wm. 4, c. 39, are not now in all cases strictly correct. Before that Act, the plaintiff had a right to treat the declaration as the commencement of the action; but now the writ is for all purposes the commencement. The declaration, therefore, instead of alleging that the period for which the bill is drawn hath now elapsed, ought at least to allege that it had elapsed at the commencement of the suit.^(m) No notice need be taken of the days of grace.⁽ⁿ⁾

It has been thought that it is not absolutely necessary, even in an action of assumpsit by an indorsee against the indorser, to allege in the declaration a promise to pay by the defendant. "The drawing of a bill," says Lord Holt, "is an actual promise."^(o) But the omission of a promise is now ground of special demurrer.^(p) For otherwise, in a count on a bill of exchange, there would be nothing to distinguish an action of assumpsit from an action of debt. A

(l) *Brandbury v. Emans*, 5 M. & W. 595; * 7 Dowl. 849, S. C.; *Reynolds v. Davies*, 1 B. & P. 625.

(m) *Abbott v. Aslett*, 1 M. & W. 209; * 1 Tyr. & G. 448; 4 Dowl. 759, S. C.; but see *Owen v. Waters*, 2 M. & W. 91; * 5 Dowl. 324, S. C. And *strictissimo jure* perhaps even the latter form is not accurate unless it appear from the whole declaration that the bill is due, or unless the period referred to may be considered as including the days of grace. But see *Padwick v. Turner*, infra. Where the date when the bill will fall due is laid, but not under a *videlicet*, the mere date has been held sufficient, if by comparison with the date of the writ appearing on record, the action appears not to be premature. *Shepherd v. Shepherd*, 1 C. B. Rep. 849, E. C. L. R. vol. 50.

(n) *Padwick v. Turner*, 11 Q. B. Rep. 124, E. C. L. R. vol. 73.

(o) *Starke v. Cheesman*, 1 Stalk. 128; *Carthew*, 509; 1 Ld. Raym. 538; *Weger-sloff v. Keen*, 1 Stra. 214; *Buckler v. Angel*, 1 Sid. 246.

(p) *Griffith v. Roxburgh*, 6 Dowl. 133; *Henry v. Burbidge*, 3 Bing. N. Ca. 501, E. C. L. R. vol. 32; 4 Scott, 296; 5 Dowl. 484, S. C.; see *Donaldson v. Thompson*, 6 M. & W. 316; * *Christie v. Peart*, 7 M. & W. 491; * *Bayley*, 6th ed.; *Stericker v. Barker*, 9 M. & W. 321; * *Smith v. Cox*, 12 L. J. Exch. 307, 11 M. & W. 475, * S. C.

declaration on a promissory note to pay at a certain date, is not double, for setting out another promise after the note is due, to pay on request.(q)

A promise to pay, made after the bill is due, should not, in strictness, be laid as a promise to pay according to the tenor and effect of the bill, but as a promise to pay on request. A promise, however, to pay an overdue bill according to its tenor and effect is good even on special demurrer.(r) An allegation, that the defendant promised to pay to the plaintiff, or promised the plaintiff to pay according to the tenor, &c., are either of *them sufficient, and amount to [*339] an allegation of a promise to the plaintiff to pay him.(s)

As to the declaration in an action on a set of bills, see the Chapter on SETS OF BILLS.

The breach by non-payment may be assigned, either in the count on the bill, or at the conclusion of the money counts.(t)

It is not necessary to add a count for interest, or to claim interest as special damage. It is recoverable as part of the ordinary and necessary damage resulting from non-payment.

As to other and special damage, see the Chapter on the remedy by ACTION ON A BILL.

The New Rules of Court(u) direct that in all actions upon bills of exchange and promissory notes, the plea of non-assumpsit shall be inadmissible.(v) In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.* the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonor of the bill or note; and all matters in confession and avoidance must be

(q) *Shepherd v. Shepherd*, 1 C. B. Rep. 849, E. C. L. R. vol. 50; 3 D. & L. 199, S. C.

(r) *Christie v. Peart*, 7 M. & W. 491; * see *Hunt v. Massey*, 5 B. & Ad. 902, E. C. L. R. vol. 27; 3 Nev. & M. 109, S. C.; *Jackson v. Pigott*, 1 Ld. Raym. 364; see *Price v. Easton*, 4 B. & Ad. 433, E. C. L. R. vol. 24; 1 Nev. & M. 303.

(s) *Bancks v. Camp*, 9 Bing. 604, E. C. L. R. vol. 23; 2 M. & Scott, 734, S. C.; *Schild v. Kilpin*, 8 M. & W. 673.*

(t) See *Benson v. White*, 4 Dow. 334; *Turner v. Denman*, 4 Tyrw. 313.

(u) H. T. 4 Wm. 4, 1834, rule 3.

(v) It is nevertheless admissible, in cases where a promise is stated, which would not be the necessary legal effect of the bill or note. As, for example, where a promise by or to an executor is alleged. See *Rolleston v. Dixon*, 14 L. J. Exch. 304, post.

specially pleaded, including, not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, and various other defences.

Therefore, since these rules, if the plea of non-assumpsit be pleaded in an action on a bill or note, the plaintiff may sign judgment.^(w) But if the promise laid is not the promise implied by law, the general issue may be pleaded. Thus, if *an executor declare on a bill [*340] or note payable to his testator laying a promise to himself (the executor), such promise may still be denied by a plea of non-assumpsit.^(x)

Although the New Rules have abolished the plea of nil debet, it has been held, that if, to a declaration in debt against the acceptor of a bill of exchange, the defendant pleads payment into Court of part, and that he is not indebted beyond that sum, and the plaintiff join issue and proceed to trial, it is competent for the defendant to make, under this plea, any defence applicable to the plea of nil debet, notwithstanding that the plea would have been bad on special demurrer.^(y)

The general issue by statute may be pleaded to an action on a bill or note.^(z)

In an action against partners, on their acceptance to a bill of exchange, a plea stating facts, from which it appears that both partners

(w) *Keily v. Villebois*, 8 Dowl. 136; *Sewell v. Dale*, 8 Dow. 309. Perhaps a nolle prosequi should be entered on the common counts. *Fraser v. Newton*, 8 Dow. 773. The plaintiff cannot, where the plea is also pleaded to the common counts, treat it as a nullity. *Eddison v. Pigram*, 16 M. & W. 137;* and *Grout v. Enthoven*, 1 Exch. Rep. 382.* It has been held, that the plea of non-assumpsit admits the handwriting. *Neal v. Proctor*, 2 Car. & K. 456, E. C. L. R. vol. 61.

(x) *Timmis v. Platt*, 2 M. & W. 720;* 5 Dow. 748, S. C., nom. *Gilbert v. Platt*; ante, p. 339, n. (v); but see *Donaldson v. Thompson*, 6 M. & W. 316.*

(y) *Finleyson v. Mackenzie*, 3 Bing. N. C. 824, E. C. L. R. vol. 32; 6 Dowl. P. C. 71; 5 Scott, 20, S. C.

(z) *Weeks v. Argent*, 17 L. J. 209, Ex.; 16 M. & W. 817,* S. C.

are not bound, is bad on special demurrer. The proper plea is a traverse of the acceptance.(a)

The indorser of a note is not a new maker or drawer as the indorser of a bill is. Therefore, where, in an action by indorsee against indorser, the plaintiff declared against the defendant as maker: it was held, that the indorsee of a note could not declare against his indorser as maker, even where the latter has indorsed a note not payable or indorsed to him, and where consequently, his indorsee cannot sue the maker, and that under a plea denying the making of the note, the defendant was entitled to a verdict.(b) But in the case of a bill of exchange it is otherwise. In an action by indorsee against indorser of a bill, the defendant pleaded that "he did not *make or draw* the bill of exchange, as in the declaration alleged," although the plea was bad in form, it was held good in substance, as every indorser of a bill is in law a new drawer, and the plaintiff was not allowed to treat the plea as a nullity, and sign judgment. The proper course for the plaintiff to *pursue, if such a plea be pleaded, [*341] is to demur instead of signing judgment.(c)

A plea denying the indorsement of a bill of exchange puts in issue, as we have seen, not only the fact of the signature, but also such a delivery and transfer, as will constitute the indorsee a holder.(d) And *facts* tending to show that no interest passed to the indorsee may be specially pleaded, for they will not amount to an argumentative traverse of the indorsement.(e) It seems that when a distant indorsee is plaintiff, an intermediate indorsement may be such in legal effect, though it would not be such if the immediate indorsee were plaintiff.(f)

(a) Jones v. Corbett, 11 L. J. 181, Q. B.; 2 Q. B. Rep. 828, E. C. L. R. vol. 42; S. C.; and see Musgrave v. Drake, 5 Q. B. Rep. 185, E. C. L. R. vol. 48; see ante, p. 35.

(b) Gwinnet v. Herbert, 5 Ad. & Ell. 436, E. C. L. R. vol. 31; 6 N. & M. 723, S. C.; ante, p. 113.

(c) Allen v. Walker, 2 M. & W. 317;* 5 Dowl. P. C. 460; 1 M. & Hurl. 44, S. C.; ante, p. 113.

(d) Marston v. Allen, 1 Dowl. N. S. 442; 8 M. & W. 494,* S. C.; Bell v. Ingestre, 12 Q. B. 317, E. C. L. R. vol. 64.

(e) Harmer v. Steele, 19 L. J. Exch. 34, reversing the decision of the Court of Exchequer in Steele v. Harmer, 15 L. J. 217, Exch.; and 14 M. & W. 831,* S. C.

(f) Hayes v. Caulfield, 5 Q. B. Rep. 81.

A plea simply averring absence of consideration is bad on demurrer. It should state affirmatively the circumstances relating to the consideration.^(g) But it is good after verdict.^(h) If the informal plea of no consideration is traversed, the affirmative still lies on the defendant, as it would have done had he pleaded properly.⁽ⁱ⁾ Where the defendant pleaded that there was no consideration, and issue was taken thereon, it was held that the defendant was at liberty to show that the contract which would otherwise have constituted the consideration was avoided by fraud.^(k) If a plea states the circumstances under which the bill or note was given, and adds that there was no consideration, a traverse of the first averment is sufficient, without a traverse of the last.^(l)

The defendant may plead, that before the action the plaintiff transferred the bill, and, therefore, that he is not the holder.^(m)

*As to the mode of pleading payment by bill or note, see the Chapter on the question how far a bill or note is considered as payment. [*342]

After pleading over, every ambiguous pleading must have such an interpretation as will make it good rather than bad,⁽ⁿ⁾ for by pleading over, the adverse party admits that he has understood it in a sense, which requires an answer.

A plaintiff is not entitled to judgment non obstante veredicto, nor a defendant to arrest the judgment for insufficient pleading, if that pleading merely leave a material allegation untraversed. The proper

(g) *Easton v. Pratchett*, 1 C. M. & R. 798; * 3 Dowl. 472; 1 Gale, 33, S. C.; *Stoughton v. Earl of Kilmorey*, 2 C. M. & R. 72; * 3 Dowl. 705; 1 Gale, 91, S. C.; *Graham v. Pitman*, 5 Nev. & Man. 37, E. C. L. R. vol. 36; 3 Ad. & Ell. 521, S. C.; *Trinder v. Smedley*, 3 Ad. & E. 522, E. C. L. R. vol. 30; 5 N. & M. 138, S. C.

(h) *Easton v. Pratchett*, in error, 2 C. M. & R. 542; * and see *Kemble v. Mills*, 1 M. & Gr. 757, E. C. L. R. vol. 39; 5 Scott, 121, S. C.

(i) *Lacey v. Forrester*, 2 C. M. & R. 59; * 3 Dowl. 668; 1 Gale, 139, S. C.

(k) *Mills v. Oddy*, 2 C. M. & R. 103; * 3 Dowl. 722; 6 C. & P. 728, E. C. L. R. vol. 25, S. C.

(l) *Atkinson v. Davies*, 11 M. & W. 236.*

(m) *Bason v. Arnold*, 6 M. & W. 559; * *Fraser v. Welch*, 8 M. & W. 630; * *Arthur v. Beales*, 1 Ex. Rep. 608.* As to the proper mode of replying to such a plea, see *Barber v. Lemon*, 11 Q. B. Rep. 302, E. C. L. R. vol. 63; 17 L. J. Q. B. 69, S. C.; *Rogers v. Chilton*, 17 L. J. 8, 345, Ex.; 1 Exch. 862, * S. C.

(n) *James v. Williams*, 13 M. & W. 828.*

course is to award a repleader, unless there be an express confession of the material part of the former pleading, or an implied confession, by pleading in confession and avoidance.(o)

Where the plaintiff's title is to be impeached by notice of fraud, notice must be expressly averred. *Indorsee v. Drawer* of a bill of exchange.—Plea that the bill had been drawn and indorsed to L. for a specific purpose, who in fraud of that purpose has handed it to H., and that H. handed it to plaintiff, not for good and valuable consideration, and that the plaintiff was not a *bona fide holder*;—Held, that the last allegation connected with the rest of the plea, meant only that the plaintiff had not given good consideration for the bill, and that fraud in the plaintiff could not be given in evidence under it; and the Court intimated, that it was their opinion, that the only proper mode of implicating the plaintiff in the alleged fraud by pleading, is to aver “that he had notice of it,” leaving the circumstances by which that notice is to be proved, directly or indirectly, to be established in evidence, and that they could not treat the allegation that the plaintiff was not a *bona fide holder* as equivalent to such an averment.(p)

A plea that defendant's agent fraudulently disposed of the bill, of which fact the plaintiff had notice, has been held bad, unless it go on to deny the receipt of any value by the defendant.(q)

Until recently payment might, in the action of *assumpsit*, have been given in evidence in reduction of damages. But not in [*343] an action of *debt*.(r) It must now in both forms of action be pleaded,(s) although the payment be of interest only.(t) If the plaintiff in his declaration gives credit for part payment, the allegation of part payment is not traversable.(u)

(o) *Gwynn v. Burnell*, 7 Bing. N. Ca. 453. Dom. Proc.; *Atkinson v. Davies*, 11 M. & W. 242.*

(p) *Uther v. Rich*, 2 P. & D. 579.

(q) *Noel v. Rich*, 2 C. M. & R. 360; * 4 Dowl. 228, S. C.; and see *Noel v. Boyd*, 4 Dowl. 415.

(r) *Cooper v. Morecraft*, 3 M. & W. 500; * 6 Dowl. 562, S. C.

(s) *R. Trin.*, 1 Vict.

(t) *Adams v. Palk*, 3 Q. B. Rep. 2, E. C. L. R. vol. 43.

(u) *Hodgins v. Hancock*, 14 M. & W. 120.* See other points relating to a plea of payment in the Chapter on *Payment*. As to the proper mode of pleading payment into Court in an action on a bill, see *Tattersall v. Parkinson*, 16 L. J. 196, Ex.; 4 Dow. & L. 522; 16 M. & W. 752,* S. C.

Where a plea alleges the satisfaction of the instrument declared on by the giving of another, it must state that the substituted instrument was given as well as taken in satisfaction.(v) Both of which allegations may be involved by the plaintiff in one traverse.(w)

To an action against the acceptor of a bill of exchange, the defendant pleaded, that he made the acceptance by force, and duress of imprisonment, and that he never had any value for accepting or paying the bill, concluding with a verification to this plea; the plaintiff demurred specially. It was held that the plea was bad for duplicity.(x) Although one of the grounds of defence be badly pleaded, the plea may, nevertheless, be double.(y) So where the defendant, as acceptor, pleaded to an action on a bill of exchange brought by the indorsee, that the defendant's bankers paid the bill, and afterwards lost it, and that it came to the plaintiff's hands without consideration, the plea was held bad for duplicity and uncertainty.(z) And in an action of assumpsit on a bill of exchange, drawn by one S. B. upon and accepted by the defendant for 25*l.*, payable three months after date; the defendant pleaded, that after the bill became due, and before the commencement of the suit, S. B. paid to the plaintiff divers moneys, to the amount of 17*l.* and did for the plaintiff *work and labor to the amount of 8*l.*, in full satisfaction and discharge [*344] of the sums of money in the bill specified, and of all damages sustained by non-payment thereof, which were then accepted and received by the plaintiff in such full satisfaction and discharge; and, further, that he, the defendant, accepted the bill at the request and for the accommodation of the said S. B., and not otherwise; and that there never was any consideration or value for the payment by the defendant, of the said bill, or any part thereof; and that the plaintiff, at the commencement of the suit, held the bill, without consideration,

(v) *Crisp v. Griffiths*, 2 C. M. & R. 159; * 3 Dowl. 752; 1 Gale, 106, S. C.

(w) *Webb v. Weatherby*, 1 Bing. N. Ca. 502, E. C. L. R. vol. 27; 1 Scott, 477; 1 Hodges, 39, S. C.; and see *Bennison v. Thelwell*, 7 M. & W. 512; * *Ridley v. Tindall*, 7 Ad. & E. 134, E. C. L. R. vol. 34.

(x) *Stephens v. Underwood*, 4 Bing. N. C. 655, E. C. L. R. vol. 33; 6 Dowl. 737; 6 Scott, 402, S. C.

(y) Per Tindal, C. J.; 4 B. N. C. 657, E. C. L. R. vol. 33; Com. Dig. Pleader, E. 2; and see *Wright v. Watts*, 3 Q. B. Rep. 89, E. C. L. R. vol. 43. In *Regil v. Green*, 1 M. & W. 328, * Parke, B., observes, "This is not precisely duplicity, but the plaintiff has no right to include several matters in his replication so as to embarrass the trial."

(z) *Deacon v. Stodhart*, 6 Bing. N. C. 594, E. C. L. R. vol. 37.

to which plea the plaintiff demurred; the Court held that the plea was bad for duplicity.(a) Where, in an action by an indorsee, the plea alleges fraud on the defendant, and then goes on to allege, both absence of consideration moving from the plaintiff, and notice of the facts, the plea is double.(b)

A special demurrer for duplicity must show wherein the duplicity consists.(c)

Although the Court will not in general determine upon the validity of a plea in point of law, or the truth of it on motion, except in particular cases, nevertheless, where a plea pleaded is beyond doubt a frivolous or sham plea, they will exercise their authority by so doing.(d) Where in an action on a bill of exchange by the indorsee, against the acceptor, the defendant set forth in his plea a number of facts, calculated to perplex the plaintiff, the Court, on an affidavit of its falsehood, no cause being shown for pleading it, set it aside.(e)

The use of the general replication, commonly called *de injuria*, in action of debt and *assumpsit*, is a novelty introduced by the special pleas now necessary in those actions. The general rules regulating its employment in an action of tort are laid down in *Crogate's case*.(f) Those rules, originally, perhaps, somewhat capricious and indefinite, have, when applied to actions founded on contract, introduced a great [*345] deal of refinement, of which it is not easy to perceive the practical utility.

The general law on the subject is, that where the defendant's plea consists of mere matter of excuse, the plaintiff may reply generally, that the defendant broke his promise without the cause alleged, and

(a) *Purssford v. Peek*, 9 M. & W. 196; * *Lane v. Ridley*, 10 Q. B. Rep. 480, E. C. L. R. vol. 59.

(b) *Leaf v. Robson*, 13 M. & W. 651.*

(c) *Smith v. Clench*, 2 Q. B. Rep. 835, E. C. L. R. vol. 42.

(d) *Horner v. Keppel*, 10 Ad. & Ell. 17, E. C. L. R. vol. 37; 2 P. & Dav. 234, S. C.

(e) *Miley v. Walls*, 1 Dowl. 648; and see *Horner v. Keppel*, 10 Ad. & Ell. 17; E. C. L. R. vol. 37; 2 P. & D. 234, S. C.; *Knowles v. Burward*, 10 Ad. & Ell. 19, E. C. L. R. vol. 37; 2 P. & D. 235, S. C.; *Balmanno v. Thompson*, 6 Bing. N. C. 153, E. C. L. R. vol. 37; 4 Jurist, 43; 8 Scott, 306, S. C.; *Bradbury v. Emans*, 5 M. & W. 595; * 7 Dowl. P. C. 849, S. C.; *Emanuel v. Randall*, 8 Dowl. 238; *Midford v. Finden*, 9 Dowl. 813.

(f) 8 Rep. 66.

so put the whole plea in issue.(g) It is, however, often difficult to distinguish between matter of excuse and matter of discharge. To pursue this subject in detail, is rather the province of a Treatise on Pleading, than of a Treatise on Bills of Exchange. The reader, who has occasion to follow out the inquiry in its relation to actions on bills and notes, will find most of the cases to which it is necessary to refer arranged in the note at the foot of the page.(h) *De injuriâ* may be replied in debt, as well as *indebitatus assumpsit*.(i)

To a plea denying consideration, a replication simply averring consideration is good.(k) And even if the plaintiff, in his replication, set out the particular consideration, and *concludes to the country*, he is not bound to prove it.(l)

(g) *Noel v. Rich*, 2 C. M. & R. 360;* 4 Dowl. 228; 1 Gale, 225, S. C.; *Griffin v. Yates*, 2 Bing. N. Ca. 579, E. C. L. R. vol. 29; 2 Scott, 845; 4 Dowl. 647; 1 Hodges, 387, S. C.; *Isaac v. Farrar*, 1 Mees. & W. 65;* 4 Dowl. 750; 1 Try. & Gr. 281, S. C.

(h) *Noel v. Rich*, 2 C. M. & R. 360,* 4 Dowl. P. C. 228, 1 Gale, 225; *Solly v. Neish*, 2 C. M. & R. 355, E. C. L. R. vol. 31; *Whittaker v. Mason*, 2 B. N. C. 359, E. C. L. R. vol. 29; 2 Scott, 567, 1 Hodges, 318, S. C.; *Isaac v. Farrar*, 1 M. & W. 65;* 1 Tyr. & G. 281, 4 Dowl. P. C. 750, 1 Gale, 385, S. C.; *Griffin v. Yates*, 2 B. N. C. 579, E. C. L. R. vol. 29, 2 Scott, 845, 4 Dowl. P. C. 647, 1 Hodges, 387; *Watson v. Wilks*, 5 Ad. & Ell. 237, E. C. L. R. vol. 31; 6 N. & M. 752, S. C.; *Reynolds v. Blackburn*, 7 Ad. & Ell. 161, E. C. L. R. vol. 34; 2 N. & P. 136, 6 Dowl. P. C. 19, S. C.; *Humphreys v. Waldegrave*, 8 Dowl. 768; *Mackay v. Wood*, 7 M. & W. 421;* *Watkins v. Bensusan*, 9 M. & W. 422;* *Myers v. Lazarus*, 6 Jur. 583; *Barnes v. Butcher*, 9 C. & P. 725, E. C. L. R. vol. 38; *Parker v. Riley*, 6 Dowl. 375; *Curtis v. Headfort*, 6 Dowl. 496; *Jones v. Senior*, 4 M. & W. 123;* *Basan v. Arnold*, 6 M. & W. 559;* *Humphreys v. O'Connell*, 7 M. & W. 371;* 9 Dowl. P. C. 213, S. C.; *Schild v. Kilpin*, 8 M. & W. 673;* 5 Jur. 874, S. C.; *Whitehead v. Walker*, 9 M. & W. 506;* *Fisher v. Wood*, 5 Jur. 933; *Scott v. Chappelow*, 4 M. & G. 336, E. C. L. R. vol. 43; *Cowper v. Garbett*, 13 M. & W. 33;* *Hartley v. Manton*, 5 Q. B. Rep. 247, E. C. L. R. vol. 48; *Herbert v. Sayer*, 5 Q. B. Rep. 965, E. C. L. R. vol. 48; *Robinson v. Little*, 18 L. J. 29, Q. B.; 9 Q. B. Rep. 602, E. C. L. R. vol. 58, S. C.; *La Forest v. Wall*, 9 Q. B. 599, E. C. L. R. vol. 58; 16 L. J., Q. B. 100; *Tolhurst v. Notley*, 17 L. J. 97, Q. B.; 11 Q. B. Rep. 406, E. C. L. R. vol. 39.

(i) *Cowper v. Garbett*, 13 M. & W. 33;* *Purchell v. Salter*, 1 Q. B. Rep. 209, E. C. L. R. vol. 41.

(k) *Prescott v. Levi*, 3 Dowl. 403; 1 Scott, 726, S. C.; *Bramah v. Roberts*, 1 Bing. N. Ca. 469, E. C. L. R. vol. 27; 1 Scott, 350, S. C.; *May v. Seyler*, 2 Exch. Rep. 563.*

(l) *Low v. Burrows*, 2 Ad. & E. 483, E. C. L. R. vol. 29; 4 N. & M. 366, S. C.; *Bailey v. Catterall*, 1 M. & Rob. 379.

[*346] *A defendant cannot demur to a replication for duplicity occasioned by the plea.(m)

Where a party to a bill, as an acceptor or indorser, is concluded from denying a fact, as for example, the drawing of a prior indorsement, the estoppel may be replied, or it seems that the plaintiff may demur.(n) For an estoppel in pais need not be pleaded.(o)

Where one plea is pleaded to several notes or bills, the plaintiff may often reply by one replication, which will be construed distributively.(p)

[*347] *CHAPTER XXXIV.

EVIDENCE.

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EXCEPT in actions for personal wrongs the party on whom lies the burden of proof is entitled to begin. But if an error in this respect be committed at the trial, a new trial will not therefore be granted, unless some injustice has been done.(a)

(m) Lane v. Ridley, 10 Q. B. Rep. 479, E. C. L. R. vol. 59; Reynolds v. Blackburn, 7 Ad. & E. 161, E. C. L. R. vol. 34.

(n) Sanderson v. Collman, 4 M. & G. 209; Armani v. Castrique, 13 M. & W. 443.*

(o) Vaughan v. Matthews, 18 L. J. 191, Q. B.

(p) Wood v. Peyton, 13 M. & W. 30.*

(a) Cannam v. Farmer, 3 Exch. Rep. 698.*

Where, in an action on a bill of exchange, the only issues lying on the plaintiff arise on the common counts, the plaintiff is not entitled to begin, unless he proposes to give evidence on those issues; (b) and using the bill as evidence under the common counts will not be sufficient. A defendant will not entitle himself to begin, by admitting all the issues that lie on the plaintiff. (c)

*A plaintiff cannot split his case, (d) except by first proving [*348] only the issues which lie on him.

The being a party to the same bill or note, on which the action is brought, is of itself no objection at common law to the competency of a witness. Unless he is directly and necessarily interested in the event of the suit, and is called in support of such interests, or unless a verdict for or against the party by whom he is called, would be admissible evidence for or against the witness in another suit, the witness is competent at common law. (e) (1)

(b) *Homan v. Thompson*, 6 C. & P. 717, E. C. L. R. vol. 25; *Smart v. Rayner*, Ibid. 721; *Mills v. Oddy*, Ibid. 728; 3 Dowl. 722, 2 C. M. & R. 103,* S. C.

(c) *Pentifex v. Jolly*, 9 C. & P. 202, E. C. L. R. vol. 38.

(d) *Jacobs v. Tarleton*, 17 L. J. 194, Q. B.

(e) *Bent v. Baker*, 3 T. R. 27; *Jordaine v. Lashbrooke*, 7 T. R. 601; *Smith v. Prager*, 7 T. R. 60; *Jones v. Brooke*, 4 Taunt. 464.

(1) The rule of *Walton v. Shelley* (1 Term Rep. 296), in which it was decided that a witness could not be heard to impugn a paper to which he had set his hand, was repudiated ten years afterwards in *Jordaine v. Lashbrooke*, 7 Term Rep. 600. In New York it was adopted in *Winton v. Saddler*, 3 Johns. Cas. 185, and abandoned afterwards in *Stafford v. Rice*, 5 Cowen, 25; *Bank v. Hilliard*, 5 Cowen, 158; *Williams v. Walbridge*, 3 Wendell, 416. But several of the other states have received the doctrine of *Walton v. Shelley*, in a modified shape, and maintained it steadily; for instance, Massachusetts, Maine, and New Hampshire. It has received the express indorsement of the Supreme Court of the United States, in the *Bank v. Dunn*, 6 Peters, 51, and in the *United States v. Leffler*, 11 Peters, 95. In Pennsylvania, it was recognized in *Pemberton v. Pleasants*, 2 Dall. 196, and has been adhered to since in a great number of cases. *Gest v. Espy*, 2 Watts, 268; *Parke v. Smith*, 4 Watts & Serg. 289; *Gilpin v. Howell*, 5 Penna. State Rep. 51; *Bank v. Fordyce*, 9 Ibid. 276; *Wilt v. Snyder*, 17 Ibid. 77.

This rule, however, is confined strictly to negotiable instruments, and does not apply even to them unless they have been actually negotiated, and that in the regular course of business previous to their maturity. A party to the instrument is not competent to prove that it was not actually so negotiated. The transaction, as it stands, presents an apparently well-founded objection to his competency, which he cannot remove by his own oath. *Baring v. Shippen*, 2 Binn. 165; *McFerran v. Powers*, 1 Serg. & Rawle, 102; *Cromwell v. Arrott*, Ibid. 183; *Baird v. Cochran*, 4 Ibid. 399; *Hepburn v. Cassell*, 6 Ibid. 113; *Bank of Montgomery v. Walker*, 9 Ibid.

And he was first made a competent witness by statute in cases where the ground of objection was merely, that the verdict or judgment would be evidence for or against him. The witness's name was to be indorsed on the record; and then the verdict or judgment was not to be evidence for or against him: 3 & 4 Wm. 4, c. 42, ss. 26 & 27. The decisions as to the effect of this statute are not very consistent. But it would seem to have applied in most cases where liability to costs would otherwise disqualify a witness.(f)

But the decisions on the former act are now immaterial, for incapacity from interest is now removed in nearly all cases, by Lord Denman's Act, 6 & 7 Vict. c. 85.

It may, however, not be entirely useless to state what the *common law* on the subject of the interest of witnesses in actions on bills of exchange still is.

If the witness have an interest both ways, he stands indifferent between the parties, and may give evidence for either. Thus, one joint maker of a note is evidence for the payee to prove the handwriting of the other maker, the defendant; for, if the plaintiff recovers of the defendant, though the witness will be discharged from his liability to the present plaintiff, he will be liable to the defendant for contribution. If, on the other hand, the plaintiff fails, though the witness will then be liable to the plaintiff, he will be entitled to recover contribution from the defendant. In either case, he must eventually pay his part, and no more, and is, therefore, a competent witness on either

(f) *Kilpack v. Major*, 11 L. J. 82, Q. B.; 2 Q. B. Rep. 737, E. C. L. R. vol. 42, S. C.

236; *Harrisburg Bank v. Foster*, 8 Watts, 309; *Parke v. Smith*, 4 Watts & Serg. 289; *Alexander v. Alexander*, 3 Penna. State Rep. 89; *Gilpin v. Howell*, 5 Ibid. 52; *Griffith v. Reford*, 1 Rawle, 196; *Harding v. Mott*, 20 Penna. State Rep. 469. The rule in *Walton v. Shelley*, does not apply where the note or bill is not the subject of the action; hence, in an action to recover from a prior indorser the amount advanced to take up the bill, the drawer and acceptor are not incompetent under the policy of the law, to prove that the bill was indorsed for the benefit of the party making the advance. *Wright v. Truefitt*, 9 Penna. State Rep. 507. A party to a bill or note may testify to facts which occurred subsequently to the negotiation of the instrument affecting it in the hands of the holder, and tending to disprove his right to recover upon it. *Parke v. Smith*, 4 Watts & Serg. 289; *Appleton v. Donaldson*, 3 Penna. State Rep. 381; *Gilpin v. Howell*, 5 Ibid. 52; *Maynard v. Nekervis*, 9 Ibid. 81; *Bank v. Fordyce*, Ibid. 276; *Pennypacker v. Umberger*, 22 Ibid. 492.

side.(g) So, where one of two partners delivered a *bill, [*349] drawn by the partnership, to a separate creditor of his own, in payment of a private debt, it was held, in an action by the creditor against the acceptor, that either partner was a competent witness for the defendant, the acceptor: the partner indebted, because, if the plaintiff recovered, the acceptor would charge the firm, and the firm would charge him; and, if the plaintiff failed, the plaintiff would do the same. The other partner was competent, because, if the plaintiff recovered, the firm would be liable to the acceptor, and, if not, to the plaintiff, and in both cases the firm could charge the sum to the indebted partner's private account.(h)

But, if the witness be liable for more costs in one case than in the other, he is interested and incompetent. Thus, in an action by the indorsee against the acceptor of a bill, accepted for the accommodation of the drawer, the drawer is not a competent witness to prove that the holder came to the bill on usurious consideration; for, though as to the sum due on the bill the witness may be indifferent, since he would have to pay it to the acceptor if the plaintiff recover, and to the plaintiff if the plaintiff do not recover (for in an action against himself he cannot be a witness to prove the usury), yet the plaintiff cannot charge him with the costs of this action, which the acceptor may do. He cannot, therefore, be a witness for the acceptor.(i) Upon the same principle, it should seem that, in an action on a joint and several promissory note, though if the action be against the principal, the surety is a good witness either for plaintiff or defendant, and if the action be against the surety, the principal may be a witness for the plaintiff, yet the principal cannot be a witness for the defendant, the

(g) *York v. Blott*, 5 M. & Sel. 71; *Lockart v. Graham*, 1 Stra. 35; *Poole v. Palmer*, 9 M. & W. 71; * *Russell v. Blake*, 2 Scott, N. R. 574; 2 M. & Gr. 374, E. C. L. R. vol. 40, S. C.; *Page v. Thomas*, 6 M. & W. 733.*

(h) *Ridley v. Taylor*, 13 East, 175.

(i) *Jones v. Brooke*, 4 Taunt. 464, recognized in *Stratton v. Matthews*, 18 L. J., Exch. 5. This decision overrules the case of *Birt v. Kershaw*, 2 East, 458, and *Shuttleworth v. Stephens*, 1 Camp. 407; but see *Roach v. Thompson*, M. & M. 488; 4 C. & P. 194, E. C. L. R. vol. 19, S. C.; and *Bagnall v. Andrews*, 7 Bing. 217, E. C. L. R. vol. 20; 4 M. & P. 839, S. C. Whether the witness's name can be indorsed on the record under the 3 & 4 Wm. 4, c. 42, does not seem clearly settled. According to *Burgess v. Cuthill*, 1 Mood. & R. 315; 6 C. & P. 282, E. C. L. R. vol. 25, S. C., it cannot. According to *Faith v. M'Intyre*, 7 C. & P. 44, E. C. L. R. vol. 32, it may, and with this case accords the most recent decision, *Kilpack v. Major*, 2 Q. B. 737, E. C. L. R. vol. 42. But Lord Denman's Act (6 & 7 Vict. c. 85), has rendered these subtleties unimportant.

surety; for if the surety is charged, he may recover against his principal, not only the debt, but the costs of the first action.^(k) But if the accommodation acceptor release the drawer, he will be rendered competent.^(l) Again, where the defendant, the drawer, drew a bill [*350] for 500*l.* on *the acceptor for the acceptor's accommodation; and the acceptor delivered it to the witness to get it discounted, and the witness delivered it to the plaintiff, it appearing that the witness was previously indebted to the plaintiff in the sum of 89*l.*, he was called by the defendant's counsel, to prove that the plaintiff gave no consideration for the bill, and that it was not delivered by him to the plaintiff in payment of his own previous debt of 89*l.*, but that the plaintiff might discount it. It was insisted that the witness was indifferent, inasmuch as if the verdict was for the defendant, the witness would still be liable for his debt to the plaintiff; and, if the plaintiff succeeded, the witness would be liable to the defendant. But Gibbs, C. J., said, "The witness bought goods of the plaintiff, and afterwards gave him this bill, out of which bill, according to the evidence, the price of those goods was to be paid. The defence is, that the witness did not deliver the bill as payment, but in order that the plaintiff might discount it. Now, if the witness received the bill merely to get it discounted, and then pledged it for a debt of his own, I am clearly of opinion, that, in a special action, he would be liable to the costs of this action, as special damage resulting from the violation of his duty."^(m)

In an action by the indorsee against the acceptor, the drawer or indorser is a competent witness *for the plaintiff*, to prove his own indorsement; for, though recovery by the plaintiff will discharge him from his liability to the plaintiff, yet, "the indorser, by proving the handwriting to be his own, will charge himself;"⁽ⁿ⁾ and, if the plaintiff resorts to him, he will have his remedy against the acceptor.^(o) He is also competent to prove the handwriting of the acceptor.^(p)

(k) See *Townsend v. Downing*, 14 East, 565.

(l) *Hardwick v. Blanchard*, Gow's N. P. C. 113.

(m) *Harman v. Lasbrey*, Holt, N. P. C. 390; *Edmonds v. Lowe*, 2 Man. & Ry. 427; 8 B. & C. 407, E. C. L. R. vol. 15; *Hall v. Rex*, 6 Bing. 181, E. C. L. R. vol. 19; 3 Moo. & P. 273, S. C.

(n) Per Lord Ellenborough, in *Richardson v. Allan*, 2 Stark. 334, E. C. L. R. vol. 3.

(o) *Wilsheir v. Cox*, 1826, Chitty, 9th ed. 673; *Hobson v. Richards*, Ib. 673.

(p) *Dickinson v. Prentice*, 4 Esp. 32; *Barber v. Gingell*, 3 Esp. 60.

And he is a competent witness *for the defendant*, to prove that the plaintiff discounted the bill upon a usurious consideration,(q) or that it has been paid.(r)

In an action by the indorsee against the drawer, a prior indorser is a competent witness to prove that the defendant promised to pay the bill after it had become due.(s) And the acceptor is a competent *witness for the plaintiff, to prove that he had no effects of the drawer in his hands, and consequently that notice of dishonor was unnecessary; for though a recovery by the plaintiff may, perhaps, relieve him from his liability to the present plaintiff, yet there is still, *prima facie*, a debt due from himself to the drawer, and the evidence given by him in this action cannot have any effect in an action to be brought against himself.(t) And the payee in such an action is competent to prove that a bill purporting to have been drawn abroad, was in reality drawn in England, and was, therefore, inadmissible in evidence.(u) In an action by the second indorsee against the first indorser, the second indorser was held a competent witness to prove that he, on receiving notice of dishonor from the plaintiff, had communicated due notice to the defendant.(v) The Court of King's Bench held, in the case of *Buckland v. Tankard*,(w) that a witness who might have a remedy by action, whether the plaintiff or defendant had a verdict, was incompetent, because, under the particular circumstances, he would have a greater difficulty in one case than in the other to enforce that remedy. But it has been observed, that this is the only case which has been decided on such a ground, and that from the leading cases on this subject, which rest on the broad ground of interest, such a circumstance may now more properly be considered as having a strong influence on the witness, but not as forming any solid objection to his competency.(x)

(q) *Rich v. Topping*, Peake, 224; 1 Esp. 176, S. C.; *Brard v. Ackerman*, 5 Esp. 119.

(r) *Charrington v. Milner*, Peake, 6; *Phetheon v. Whitmore*, Ib. 40; *Humphrey v. Moxon*, Ib. 52; *Adams v. Lingard*, Ib. 117.

(s) *Stevens v. Lynch*, 2 Camp. 332; 12 East, 38, S. C. In an action by indorsee against acceptor, where issue was joined on a plea of payment, a prior indorser was held to be a competent witness for the defendant, though he acknowledged on the *voire dire*, that he received the money from defendant to pay plaintiff the bill. *Reay v. Packwood*, 7 Ad. & Ell. 917, E. C. L. R. vol. 34.

(t) *Staples v. Okines*, 1 Esp. 332; *Legge v. Thorpe*, 2 Camp. 310; 12 East, 171, S. C.

(u) *Jordaine v. Lashbrooke*, 7 T. R. 601.

(v) *Chitty*, 9th ed. 674.

(w) 5 T. R. 579.

(x) *Phillipps on Evid.*, 7th ed. 69.

In an action, *ex contractu*, against several defendants, a defendant who has suffered judgment by default, is a competent witness for the plaintiff against other defendants who plead to the action.(y)

In an action by the indorsee against the maker of a note, the declarations of the payee at the time of making it are evidence as part of the *res gestæ*.(z)

It has been held that declarations by the holder of a negotiable instrument, made whilst he was holder, are evidence against a plaintiff [*352] who claims under him,(a) in the same *manner as declarations respecting his title, made by a former owner of an estate whilst he was in possession, are evidence against a subsequent owner.(b)

But there is an obvious distinction, between the case of an assignee of land or other property and the assignee of a negotiable instrument. The former has, in general, no title either at law or in equity, unless his assignor had, but the latter may, as we have seen, have a very good title, though his assignor had none at all. Accordingly, it has been decided that unless the plaintiff on a bill or note stands on the title of a former holder, the declarations of such former holder are not evidence against him.(c) But if he does stand on the title of a prior holder, as if he have taken the bill overdue or without consideration, then the declarations of that prior holder under whom he claims, and on whose titles he stands, are evidence against him.

It has been held, that a jury can draw no inference from an admission on record. "The pleadings," says Alderson, B., "are not before the jury, but only the issue,"(d) But the Court of Queen's Bench have held otherwise.(e)

(y) *Worrall v. Jones*, 7 Bing. 395, E. C. L. R. vol. 20; *Pipe v. Steele*, 2 Q. B. Rep. 733, E. C. L. R. vol. 42; *Green v. Sutton*, 2 Moo. & Rob. 269.

(z) *Kent v. Lowen*, 1 Camp. 177, and 180, d.

(a) *Pocock v. Billing*, 2 Bing. 269, E. C. L. R. vol. 9; Ry. & M. 127, S. C.

(b) *Woolway v. Rowe*, 1 Ad. & E. 114, E. C. L. R. vol. 28; 3 N. & M. 849, S. C.

(c) *Barough v. White*, 4 B. & C. 325, E. C. L. R. vol. 10; 6 D. & Ry. 379; 2 C. & P. 8, E. C. L. R. vol. 12, S. C.; *Beauchamp v. Parry*, 1 B. & Ad. 88, E. C. L. R. vol. 20; *Shaw v. Broom*, 4 D. & R. 731, E. C. L. R. vol. 16; *Smith v. De Wruitz*, 1 R. & M. 212; and see *Phillips v. Cole*, 10 Ad. & E. 106, E. C. L. R. vol. 37; 2 P. & D. 288, S. C.

(d) *Edmunds v. Groves*, 2 Mees. & W. 642; * 5 Dowl. 775, S. C.

(e) *Bingham v. Stanley*, 2 Q. B. 117, E. C. L. R. vol. 42; see *Malpas v. Clements*, 19 L. J. 435.

Where there is no attesting witness, the signature to a bill may be proved by any person who has seen the party write, or has received letters from him.(1)

Where there is an attesting witness, he must be called, unless he be dead, insane, or out of the jurisdiction of the Court.(f)

An agreement that certain shares are to be held as a collateral security for a bill is evidence to prove an allegation that any sum received by the holder should be satisfaction *pro tanto*.(g)

It has been held that there must be some evidence of the identity of the person whose handwriting is proved *as the defendant's with the real defendant, and that mere correspondence of [*353] Christian and surname is no evidence of identity.(h) But the inconvenience of such a doctrine soon compelled the Courts to retrace their steps. "The transactions of the world," says Lord Denman, "could not go on, if such an objection were to prevail. It is unfortunate, that the doubt should ever have been raised, and it is best that we should sweep it away as soon as we can."(i)

It is conceived that there must be some peculiar circumstances tending to raise a question, before the plaintiff can be required to show, that the person who signed the bill or note, and whose Christian and surname agree with the defendant's, is the *person who was served with the writ*.

Where it is necessary to prove the consideration, and on whom the burden of proof lies, see the Chapter on CONSIDERATION.

It is not necessary to produce the bill on the trial, unless some

(f) The attesting witness must be called, though the attestation be on the back of the bill. *Richards v. Frankum*, 9 C. & P. 221, E. C. L. R. vol. 38; and though he be blind. *Crank v. Frith*, 2 Mood. & Rob. 262.

(g) *Malpas v. Clements*, 19 L. J. 435, Q. B.

(h) *Whitelock v. Musgrave*, 1 C. & M. 511; * *Jones v. Jones*, 9 M. & W. 75; * 11 L. J. 265, Exch.; *Bell v. Gunn*, 11 L. J. 57, C. P.; see p. 355. As to identity of first indorser with drawer, see *Smith v. Moneypenny*, 2 Mood. & Rob. 317.

(i) *Sewell v. Evans*, 4 Q. B. Rep. 626, E. C. L. R. vol. 45; *Roden v. Ryde*, *Ibid.*; *Hamber v. Roberts*, 18 L. J. 250, C. P.

(1) Evidence that the name of the indorser is the signature by which his business was transacted is admissible without proving it to be his handwriting. *Bingham v. Peters*, 1 Gray, 139.

issued be joined, which renders the production of the bill necessary; (*l*) nor on a writ of inquiry; (*m*) nor will statements in the plea entitle the defendant to offer evidence of it without notice to produce. (*n*) But if interest be sought from a period before the issuing of the writ, it may be necessary to produce the bill. (*o*)

If a bill or note be signed or indorsed with a mark, such mark may be proved by a person who has seen the party so execute instruments, and can recognize some peculiarity in the mark. (*p*)

Where an acceptance is by the Christian and surname of the drawer, a witness who has seen him write his surname only is competent to prove the acceptance. (*q*)

[*354] *An averment that the defendant made a note, "his own proper hand being thereunto subscribed," is satisfied by proof that the note was made by an agent, for those words may be rejected as surplusage. (*qq*)

An admission under a Judge's order that a bill was accepted by A. for B., is an admission of A.'s authority. (*r*)

A promissory note, as between the original parties, is evidence of an account stated, and of money lent, (*s*) and is admissible as a paper or writing to prove the defendant's receipt of so much money; and that though it has been invalidated, *as a note*, by alteration. (*t*) But

(*l*) *Shearm v. Barnard*, 10 Ad. & E. 593, E. C. L. R. vol. 37; 2 Per. & Dav. 565; *Read v. Gamble*, 5 N. & M. 433, E. C. L. R. vol. 36; 10 Ad. & E. 597, n., S. C.; but see *Fryer v. Brown*, R. & M. 145.

(*m*) *Lane v. Mullins*, 1 Gale & Dav. 712; 11 L. J., Q. B. 51, 2 Q. B. Rep. 254, E. C. L. R. vol. 42, S. C.; *Davis v. Barker*, 3 C. B. Rep. 606, E. C. L. R. vol. 54.

(*n*) *Goodered v. Armour*, 3 Q. B. Rep. 956, E. C. L. R. vol. 43. As to what is a sufficient notice, see *Lawrence v. Clark*, 3 D. & L. 87.

(*o*) *Mutton v. Ward*, 19 L. J. 292, Q. B. (*p*) *George v. Surrey*, M. & M. 516.

(*q*) *Lewis v. Sapio*, M. & M. 39, overruling *Powell v. Ford*, 2 Stark. 164, E. C. L. R. vol. 3.

(*qq*) *Booth v. Grove*, M. & M. 182; 3 C. & P. 335, E. C. L. R. vol. 14, S. C.

(*r*) *Wilkes v. Hopkins*, 1 C. B. Rep. 737, E. C. L. R. vol. 50.

(*s*) *Clark v. Martin*, Ld. Raym. 758; per Lord Mansfield in *Grant v. Vaughan*, 3 Bur. 1525; Bayley, 357; *Morgan v. Jones*, 1 C. & J. 167.* Money deposited with a banker is money lent. *Pott v. Clegg*, 16 Mees. & W. 321.*

(*t*) *Sutton v. Toomer*, 7 B. & C. 416, E. C. L. R. vol. 14; 1 Man. & R. 125, S. C.; *Tomkins v. Ashby*, 6 B. & C. 541, E. C. L. R. vol. 13; 9 Dowl. & R. 543; M. & M. 32, S. C. But see ante, p. 253.

a bill which never was properly stamped is not admissible in evidence for collateral purposes, though formerly held to be so.(u) But an instrument though not stamped is admissible to show that the transaction is void, as for usury.(v) An instrument promising payment on condition, which, as we have seen, is not a promissory note, is not evidence to sustain the money counts.(w)

Upon principle, it appears clearly that a bill or note can be evidence under the money counts only as between immediate parties, and the later decisions are in favor of this doctrine,(x) though it has been held evidence of money received to the use of the holder.(y) An indorsement is prima facie evidence of money lent by the indorsee to the indorser.(z)(1)

A check not presented has been held not to be evidence of money lent by the drawer to the payee.(a)

In an action by the payee against the maker of a note, or acceptor of a bill, the plaintiff must prove the handwriting(b) *of the [*355] person whose name appears as the maker of the note or acceptor of the bill.

(u) *Jardine v. Payne*, 1 B. & Ad. 663, E. C. L. R. vol. 20; *Jones v. Ryder*, 4 M. & W. 32.*

(v) *Nash v. Duncomb*, 1 M. & Rob. 104.

(w) *Morgan v. Jones*, 1 C. & J. 162;* 1 Tyrw. 21, S. C.

(x) *Waynam v. Bend*, 1 Camp. 175; *Bentley v. Northhouse*, M. & M. 66; *Eales v. Dicker*, M. & M. 324; *Bayley*, 357, 6th ed.

(y) *Vide Chitty*, 9th ed. 581, and *Bayley*, 6th ed. p. 358; *Grant v. Vaughan*, 3 Burr, 1516.

(z) *Kessebower v. Tims*, *Bayley*, 6th ed. 359, and 357.

(a) *Pearce v. Davis*, 1 M. & Rob. 365.

(b) By R. Hil. 2 Wm. 4, the costs of proving handwriting are not to be allowed without a previous summons to admit. R. Hil. 4 Wm. 4, directs the party who is about to adduce any written document in evidence to give the adverse party notice to admit it.

(1) In an action indorsee against acceptor, a bill is sufficient prima facie evidence to sustain the common counts. *Black v. Caffé*, 3 Selden, 281; *Haviland v. Simons*, 4 Richardson, 338; *Purdy v. Vermilya*, 4 Selden, 346. The third indorser of a promissory note may maintain assumpsit for the money had and received against the first. *Martin v. Farnum*, 4 Foster, 191. An accommodation note, in an action, indorsee against indorser, is evidence of indebtedness under the money counts. *Cayuga Bank v. Warden*, 2 Selden, 19. The indorsee of a draft has no right to sue the drawer on the original consideration. *Battle v. Coit*, 19 Barbour, S. C. Rep. 68.

In an action by the indorsee against a maker or acceptor, the plaintiff must first prove the making of the note or the acceptance of the bill. We have already seen that the acceptance admits the drawing. Then the indorsement must be proved, and, if it be special, it must appear that the indorsee is the person described in it. If the instrument be payable to bearer, or indorsed in blank, it is, of course, unnecessary to allege or prove(*c*) a subsequent indorsement.

A promise to pay, or an offer to renew a bill or note, made to the indorsee after it is due, is an admission of the holder's title, and will make the proof of indorsement unnecessary.(*d*) But the admission of an indorser is evidence against him only, not against other parties.(*e*)

In an action by an indorsee against an indorser, it is necessary, first, to prove the indorser's signature, which admits the ability and signature of every antecedent party ;(*f*) then, a due(*g*) presentment for payment or acceptance, and dishonor ; and, lastly, notice of dishonor, or a competent excuse for neglecting to give it.

An indorsement is evidence, in this action, under the common counts.(*h*)

If a bill be taken up by the drawer, the payment of the money mentioned in it may be proved by the payee or indorsee who returned it.

A general receipt on the back of a bill is not of itself evidence of the payment by the drawer, though he produces the bill,(*i*) for "prima facie," says Lord Kenyon, "the receipt on the back imports that it was paid by the acceptor." But *this doctrine must be taken [**356*] with the qualification that slight circumstances will show the contrary.(*k*)

(*c*) Unless averred in the declaration. See Chapter on *Transfer*.

(*d*) *Hankey v. Wilson*, Sayer, 223 ; *Bosanquet v. Anderson*, 6 Esp. 43 ; *Sidford v. Chambers*, 1 Stark. 326, E. C. L. R. vol. 2 ; *Jones v. Morgan*, 2 Camp. 474.

(*e*) *Hemings v. Robinson*, Barnes, 436.

(*f*) *Critchlow v. Parry*, 2 Camp. 182 ; *Chaters v. Bell*, 4 Esp. 210 ; *Lambert v. Pack*, 1 Salk. 127.

(*g*) An entry by a deceased clerk of a notary of the presentment of a bill is evidence. *Poole v. Dicas*, 1 Bing. N. C. 649, E. C. L. R. vol. 27 ; 1 Scott, 600 ; 7 C. & P. 79, E. C. L. R. vol. 32, S. C.

(*h*) *Keesebower v. Tims*, Bayley, 6th ed. ; and see ante, 354.

(*i*) *Scholey v. Walsby*, Peake, 24.

(*k*) See *Phillips v. Warren*, 14 Mees. & W. 379.*

Parol evidence is admissible to explain the receipt.(l)

There are two statutes enabling a Judge to cure a variance by amending a record at the trial, the 9 Geo. 4, c. 15, and the 3 & 4 Wm. 4, c. 42, s. 23.

Where there is a variance between the bill or note and the record, the Judge, at the trial, may, under the 9 Geo. 4, c. 15, order the record to be amended; but whether he will allow the amendment or not, rests in his discretion, and it should seem that it is not competent for the Court above to review the exercise of that discretion.(m)

Where, in an action by the indorsee against the drawer, the declaration stated that the bill was accepted, "payable at Esdaile and Co.'s, Bankers, London, or at No. 18, Poland Street, Oxford Street," and it appeared on the face of the bill that the latter alternative place of payment was not in the acceptor's handwriting, but that it had been added afterwards, Lord Tenterden refused to allow an amendment. "The object of the act of Parliament," says his Lordship, "was to prevent a failure of justice from accidental errors. Now this is a blunder that no man could make who would but use his eyesight. I have always thought that we have gone too far from the strict rules for the purpose of obtaining justice in some particular case. The consequence of which has been, that those cases having been quoted as precedents, great laxity has been introduced into the practice."(n) But where, in an action by an indorsee against an indorser, the declaration stated the bill to have been made payable to the drawer, and to have been indorsed by him, whereas the bill, when produced, appeared to have been made payable to another payee, and to have been indorsed by such other payee, the Judge allowed the record to be amended, and the Court of Exchequer, after intimating an opinion that they were not competent to review the amendment, said, that in their judgment the discretion had been properly exercised.(o) A variance in the date will be amended.(p) An amendment can be made under this *statute only where a party [*357] assumes to set out a written instrument.

(l) *Graves v. Key*, 3 B. & Ad. 313, E. C. L. R. vol. 23.

(m) *Parks v. Edge*, 1 C. & M. 429; * 3 Tyr. 364, 1 Dowl. 643, S. C. See *Lamey v. Bishop*, 4 B. & Ad. 479, E. C. L. R. vol. 24; 1 N. & M. 332, S. C.

(n) *Jelf v. Oriel*, 4 C. & P. 22, E. C. L. R. vol. 19.

(o) *Parks v. Edge*, 1 C. M. & R. 429, E. C. L. R. vol. 41; 3 Tyr. 364, 1 Dowl. 643, S. C.

(p) *Bentzing v. Scott*, 4 C. & P. 24, E. C. L. R. vol. 19.

The power of amendment is now much enlarged by the 3 & 4 Wm. 4, c. 42, s. 23, and it is exercised under this act so liberally and beneficially as to cure most instances of variance in actions on bills. Where the acceptor had died before presentment for payment, and the declaration in an action against the indorser averred a presentment to the drawee, on which averment issue was taken, the plaintiff was permitted to amend by inserting an averment as well of the drawee's death as of presentment to his executor.(g)

Yet the amendment must not be such as will make the declaration bad on special demurrer.(r) But this objection to the amendment must be pointed out at the time.(s)

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*CHAPTER XXXV.

OF THE BANKRUPTCY OF PARTIES TO A BILL OR NOTE.

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(g) Caunt v. Thompson, 18 L. J. 125, C P. (r) Oakley v. Pritchard, Exch.

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*To discuss at length the subject of bankruptcy would far exceed our limits. It is proposed, therefore, merely to sketch [*359] an outline of the law on the subject, so far as it relates to bills and notes.

The title of assignees (unless where restrained by particular enactment),(a) relates to any act of bankruptcy after the date of the petitioning creditor's debt, but not to any act of bankruptcy before that date.

It cannot of course relate to any act of bankruptcy prior to the petitioning creditor's debt, if there were not at the time of such prior act of bankruptcy another sufficient debt to found adjudication on.(b) Nor even if there were a sufficient debt to found an adjudication on; for as that would, even before the 46 Geo. 3, c. 145, s. 5, have invalidated the commission,(c) the assignees could not rely on it. The 46 Geo. 3, c. 145, s. 5, and the corresponding enactments, 6 Geo. 4, c. 16, s. 19, and 12 and 13 Vict. c. 106, s. 88, though they relieve the assignees from the disabling effect of such prior act of bankruptcy, do not go further, and enable the assignees to take advantage of it.

Hence, it follows that the assignees cannot impeach transactions with the bankrupt in respect of bills and notes, except after an act of bankruptcy within the reach of the petitioning creditor's debt.(d)

(a) The act of bankruptcy must be within twelve months before the petition, 12 & 13 Vict. c. 106, s. 88.

(b) Doe v. Boulcot, 2 Esp. 595.

(c) The bankrupt could not, under any circumstances, have availed himself of a prior act of bankruptcy to defeat the commission. Donovan v. Duff, 9 East, 21; Rex v. Bullock, 1 Taunt. 71.

(d) Ward v. Clarke, M. & M. 497; Ex parte Birkett, 2 Rose, 71; Norman v. Booth, 10 B. & C. 703, E. C. L. R. vol. 21. The provisions of the 6 Geo. 4, c. 15, s. 16, for the substitution of another debt for the petitioning creditor's, provided that

Further particular limitations within this general limitation are introduced by the old statutes, and by various sections of the new General Bankrupt Act.(e)

Conveyances, contracts, and other transactions by the bankrupt, and executions against him, though after an act of bankruptcy, if without notice of it, and more than two months before the issuing of the fiat, were valid even before the former General Bankrupt Act.(f)

Thus, where a bill of exchange was delivered by a bankrupt, with intent to transfer the property, more than two months before the [*360] commission issued, though not actually indorsed till *within the two months, it was holden to vest in the indorsee, and not in the assignees.(g)

And, now, all bona fide payments, by or to any bankrupt, and all contracts, dealings, and transactions with the bankrupt, before the filing of a petition for adjudication of bankruptcy, *without notice* of an act of bankruptcy, are protected.(h)

Purchasers of any property from the bankrupt, bona fide and for valuable consideration after an act of bankruptcy, and *with notice* thereof, are protected, unless a petition for adjudication of bankruptcy shall have been filed within twelve months after such act of bankruptcy.(i)

The title to property sold under an adjudication of bankruptcy cannot be impeached by the bankrupt, or any person claiming under him, unless the bankrupt have commenced proceedings to annul the petition within twenty-one days from its advertisement in the Gazette.(k)

It seems that the expression, notice of an act of bankruptcy, is satisfied by a general notice, that the party has committed an act of bankruptcy. And that notice of the specific act is not necessary.(l) the substituted debt shall not be of prior date. This proviso is omitted in the corresponding and now existing enactment, 12 & 13 Vict. c. 106, s. 103.

(e) 12 & 13 Vict. c. 106.

(f) 6 Geo. 4, c. 16, s. 81.

(g) Anon. 1 Camp. 492, n.

(h) 12 & 13 Vict. c. 106, s. 103, repealing and re-enacting the 2 Vict. c. 11, and 2 & 3 Vict. c. 29.

(i) 12 & 13 Vict. c. 106, s. 134; see s. 86 of 6 Geo. 4, c. 16.

(k) 12 & 13 Vict. c. 106, ss. 131 and 233, further periods are given him if he were out of the United Kingdom, s. 233.

(l) Udal v. Walton, 14 Mees. & W. 254;* and see Conway v. Nall, 1 C. B. 643, E. C. L. R. vol. 50; Follet v. Hoppe, 17 L. J., C. P. 76.

It may be given to the party's attorney; *(m)* but not to a mere clerk in the attorney's office, not having the management of the affair. *(n)* It may be given to the accredited agent of a body corporate or public company. *(o)*

A bill given by the bankrupt to a petitioning creditor after bankruptcy is void. *(p)*

In almost all cases where a bankrupt would be liable to an action at law or suit in equity by the holder of a bill or note, the holder may prove on the bankrupt's estate for the amount of it. And whatever would be a defence to a suit in law or equity, will be an answer to such proof. *(q)*

*Where a stock-jobber, having a large sum of money in his hands to be employed in stock-jobbing transactions, contrary [*361] to the 7 Geo. 2, c. 8, diverted part to his own use, and gave promissory notes to his employer, they were allowed to be proved only to the extent of the money diverted from the illegal purpose to the stock-jobber's own use. *(qq)* "The equity is," says the Lord Chancellor, "that where the consideration consists of two parts, one bad, the other good, the bill shall stand as to what is good." *(r)*

Bills, notes, and securities, not due at the time of the bankruptcy, may be proved, deducting a rebate of interest, at 5*l.* per cent. to be computed from the declaration of a dividend. *(s)*

The holder of a note payable on demand may prove, though no demand has been made before the act of bankruptcy. *(t)*

(m) *Rothwell v. Timbrell*, 1 Dowl. N. S. 779.

(n) *Pike v. Stephens*, 12 Q. B. 465, E. C. L. R. vol. 64; 18 L. J., C. P. 291; see *Pennell v. Stephens*; *Fawcett v. Fearn*, 6 Q. B. Rep. 20, E. C. L. R. vol. 51; *Green v. Steer*, 1 Q. B. Rep. 710, E. C. L. R. vol. 41. Notice to the sheriff is not sufficient to defeat an execution. *Ramsey v. Eaton*, 10 M. & W. 22.*

(o) 12 & 13 Vict. c. 106, s. 89.

(p) *Rose v. Main*, 1 Bing. N. C. 357, E. C. L. R. vol. 27; 1 Scott, 127, S. C. See 12 & 13 Vict. c. 106, ss. 71 & 268.

(q) See *Ex parte Dewdney*, 15 Ves. 495; *Ex parte Smith*, 3 Bro. C. C. 1; *Ex parte Wilson*, 11 Ves. 410; *Ex parte Gifford*, 6 Ves. 807; *Ex parte Heath*, 2 V. & B. 240; *Ex parte Barclay*, 7 Ves. 797; *Ex parte Rofey*, 19 Ves. 488; 2 Rose, 245, S. C. *(qq)* *Ex parte Bulmer*, 13 Ves. 2; C. P. 76.

(r) *Ex parte Mather*, 3 Ves. 373; see ante.

(s) 12 & 13 Vict. c. 106, s. 172. See also the repealed act 6 Geo. 4, c. 16, s. 51.

(t) *Ex parte Beaufoy*, Co. B. Law, 180.

A note payable at twelve months' notice with interest, is provable against the estate of the maker, though he become bankrupt before any notice is given.(u)

A bill or note defective in form, or void for want of a stamp,(v) or payable on a contingency,(w) or payable in notes,(x) is not, *as a bill or note*, provable.

A bill, as such, cannot be proved against a man who is not a party to the instrument,(y) though he give a written engagement, not on the bill, to guarantee the payment of it.(z) But the holder may prove on such engagement made before the bankruptcy.(a) And in other cases the estate may be liable to proof for the consideration, though not for the bill itself.(b)

And it has been held, that a person who passes a bill without [*362] indorsement, and takes it up after the acceptor has become bankrupt, will not be allowed to prove it against the acceptor's estate.(c)

Where a bill has been lost, a party claiming to prove, must give an indemnity to the satisfaction of the commissioners.(d)

The former Bankrupt Act, 6 Geo. 4, c. 16, s. 52, and the corresponding provision in 12 and 13 Vict. c. 106, s. 173, enacts, that any person, who at the issuing of the commission may have become, without notice of an act of bankruptcy, surety, or liable for the debt of the bankrupt, and shall have paid the debt or any part in discharge of the whole, though after the commission, shall, if the creditor have

(u) Clayton v. Gosling, 5 B. & C. 360, E. C. L. R. vol. 11 ; 8 D. & R. 110, S. C. ; Ex parte Elgar, 2 G. & J. 1 ; Ex parte Downman, 2 G. & J. 85, and 2 G. & J. 241.

(v) Ex parte Manners, 1 Rose, 68.

(w) Ex parte Tootel, 4 Ves. 372.

(x) Ex parte Immeson, 2 Rose, 225 ; Ex parte Davidson, Buck. 31.

(y) Ex parte Roberts, 2 Cox, 171.

(z) Ex parte Harrison, 2 Cox, 172. ; 2 Bro. C. C. 614, S. C. ; In re Barrington, 2 Scho. & Lef. 112 ; Ex parte Hustler, 1 G. & J. 9.

(a) Ex parte Bell, 1 Mont. B. L. 194 ; and see Ex parte Blackburn, 10 Ves. 206 ; Ex parte Rathbone, Buck. 215.

(b) Ibid. and Ex parte Robinson, Buck. 113.

(c) Ex parte Isbester, 1 Rose, 20. See the Chapter on *Transfer* and *Notice of Dishonor*.

(d) Ex parte Greenway, 6 Ves. 812 ; General Order, Nov. 12th, 1842, r. 25.

proved, stand in his place, and receive the dividends, and if the creditor have not proved shall be entitled to prove.

A man who is at law a principal, if he be in equity a surety, is within the section; the jurisdiction in bankruptcy being equitable as well as legal.(e)

Hence, not only a party who is on the face of a bill or note surety for a bankrupt, but one who has accepted, drawn, made, or indorsed a bill or note for the accommodation of the bankrupt, may, at any time after he has paid it, prove the amount upon the estate, though he did not pay it till after the commission issued, for he is deemed a surety or person liable for the debt of the bankrupt within the statute,(f) and will be entitled, if the party to whom he paid the bill have proved his debt, to stand in his place as to the dividends and all other rights under the commission, and will be barred by the certificate.(g) But an election by the holder to prove will not conclude the drawer, but the drawer having paid the holder, may sue the bankrupt before certificate.(h) Where upon a dissolution of partnership, the partner continuing the business expressly agrees to assume the firm and to guarantee the retiring partners, and he becoming bankrupt, they are obliged to pay a bill accepted by the firm, the retiring partners are considered as persons liable for the debts of the *bankrupt, are entitled to prove under his commission, and are barred by his certificate.(i) If the suretyship commenced [*363] before notice of an act of bankruptcy it may be continued afterwards, as, for example, by the renewal of an acceptance.(k) But where a bond or promissory note is given by a principal and several sureties, and one of the sureties becomes a bankrupt, his obligation is not considered to be a debt within the statute for which the cosureties are liable.(l) Where the accommodation acceptor has sustained special

(e) *Wood v. Dodgson*, 2 M. & S. 195, E. C. L. R. vol. 28; *Ex parte Lloyd*, 1 Rose, 4.

(f) 6 Geo. 4, c. 16, s. 52; *Ex parte Lloyd*, 1 Rose, 4; *Bassett v. Dodgin*, 9 Bing. 653, E. C. L. R. vol. 25; 2 M. & Sco. 777, S. C.; *Ex parte Yonge*, 3 V. & B. 40; 2 Rose, 40, S. C.; *Stedman v. Martinant*, 13 East, 427; *Haigh v. Jackson*, 3 Mees. & W. 598.*

(g) *Bassett v. Dodgin*, 9 Bing. 653, E. C. L. R. vol. 23; 2 M. & Scott, 777, S. C.

(h) *Mead v. Braham*, 3 M. & S. 91; *Westcott v. Hodges*, 5 B. & Ald. 12, E. C. L. R. vol. 7; *Walker v. Pilbeam*, 4 C. B. Rep. 229, E. C. L. R. vol. 56.

(i) *Wood v. Dodgson*, 2 M. & Sel. 195; *Haigh v. Jackson*, 3 M. & W. 598; **Aflalo v. Fourdriner*, 6 Bing. 306, E. C. L. R. vol. 19; M. & M. 334, n., S. C.

(k) *Stedman v. Martinant*, 13 East, 427.

(l) *Clements v. Langley*, 5 B. & Ad. 372, E. C. L. R. vol. 27; 2 N. & M. 269, S.

damage, an action for damage is barred by the certificate.^(m) Payment of a portion of the debt merely in discharge of the surety's personal liability is not a payment within the statute.⁽ⁿ⁾

A holder has an election to proceed by proof under the bankruptcy, or by action, but cannot do both; yet he may proceed against some parties to the bill by action, and against others by proof under the bankruptcy; and against the same party he may prove for one debt, and bring his action for another. "It is clear," observes the Court of Common Pleas, "that a creditor has a right to sue for, or to prove each individual debt, as may best suit his purpose."^(o)

The principal difficulties as to proof in respect of accommodation bills arise, where there has been mutual accommodation between the bankrupt and other parties.

Mutual accommodation may be either with a specific exchange of securities or without a specific exchange of securities.

Mutual accommodation with specific exchange is, where the acceptance of A. is exchanged for the acceptance of B. to the same amount. In this case each party is bound to pay his own acceptance, and, in paying it, is not considered as surety for another. Plaintiff and defendant each drew a bill on the *other for the same amount, [*364] and each accepted the bill drawn on him without further consideration. Before the bills became due, defendant became bankrupt, having indorsed the bill accepted by the plaintiff to a creditor. The creditor proved the bill under the commission, and then the plaintiff paid the creditor the residue. The plaintiff now sued the defendant on the bill accepted by the defendant. But the Court of Common Pleas were clearly of opinion, that the two bills were mutual engagements; Wallis v. Swinburne, 17 L. J., Exch. 169; but see the larger provision of 12 & 13 Vict. c. 106, s. 178.

(m) Vansandau v. Corsbie, 8 Taunt. 550, E. C. L. R. vol. 4; 2 Moo. 602; S. C. in error, 3 B. & Ald. 13.

(n) Soutten v. Soutten, 5 B. & Ald. 852, E. C. L. R. vol. 7.

(o) Bridget v. Mills, 4 Bing. 18, E. C. L. R. vol. 13; 12 Moo. 92, S. C.; Ex parte Grosvenor, 14 Ves. 588; Ex parte Glover, 1 G. & J. 270; Watson v. Medex, 1 B. & Ald. 121; Harley v. Greenwood, 5 B. & Ald. 95, E. C. L. R. vol. 7; 2 D. & R. 337, S. C.; Mead v. Braham, 3 M. & Sel. 91; Ex parte Lobbon, 17 Ves. 344; 1 Rose, 219, S. C.; Adames v. Bridger, 8 Bing. 314, E. C. L. R. vol. 21; 1 Moore & S. 438, S. C.; Ex parte Edward, 1 Mont. & Mac. 116; 6 Geo. 4, c. 16, s. 59; 12 & 13 Vict. c. 106, s. 182.

ments, constituting on each side a debt, the one being a consideration for the other. That the bill accepted by the defendant, and on which the plaintiff sued, created an absolute debt from the beginning, which was capable of being proved under the commission, and, being so provable, was necessarily barred by the certificate.^(p) Three years after, two of the Judges of the Court of King's Bench held the same doctrine. The Peters and the Dunlops had specially exchanged acceptances to the amount of 3000*l*. Both parties became bankrupt. The Peters and their estate had paid money on their own acceptances, and also on the Dunlops' acceptances. Both parties had obtained their certificates. The action was brought by the assignees of the Peters' for money paid against the certificated bankrupts. It was held by Lawrence and Grose, Justices,—First, that for payments on account of the Peters' own acceptances, the Peters' assignees had no remedy, for that the Peters' were bound to pay those acceptances: and, secondly, that they could not recover for money paid on the Dunlops' acceptances for two reasons; because the action should have been brought on the bills, and not on any implied promise, there being an express one; and also because the Dunlops' acceptances were provable under the Dunlops' commission, and therefore were barred by the certificate.^(q) About four years afterwards, the doctrine of Mr. J. Grose and Mr. J. Lawrence was adopted by the whole Court of King's Bench. Plaintiff and defendants had made specific exchange of bills. Of some of the bills given by defendants to plaintiff, defendants were drawers, of others, indorsers. The bills given by defendants to plaintiff were all dishonored. Defendants became bankrupt. Before their bankruptcy, plaintiff paid money on his own acceptances, for which he had proved under the commission. After the bankruptcy, he paid the residue of the money due on his own acceptances, amounting to 49*l*. 15*s*. 2*d*. This action was brought to recover that sum as money paid. It was held, that plaintiff did not pay his own acceptance as **surety*; that he had, therefore, no remedy to recover such payments, but that his remedy [*365] would have been on the cross bills, had they not been barred by the certificate.^(r)

It is not essential, in order to constitute a specific exchange of

(p) Rolfe v. Caslon, 2 H. & Bl. 570, anno 1795.

(q) Cowley v. Dunlop, 7 T. R. 565, anno 1798, Lords Kenyon and Ashurst, Justices, dissentientibus.

(r) Buckler v. Buttivant, 3 East, 73, anno 1802.

securities, that the acceptances given in exchange should be the acceptances of the party giving them, nor that the amounts or dates should be exactly the same.(s)

Formerly, a party to a specific exchange of paper was allowed to prove the bankrupt's paper, without having paid his own, the dividends being retained until he had paid his own paper;(t) but now he must, before he can *prove*, take up his own bills, to exonerate the bankrupt's estate from the original debt.

Mutual accommodation without specific exchange will not create a debt from the acceptor to the drawer. But the acceptor is to be considered as a surety, and may recover what he pays as money paid to the drawer's use.

If the holder of a bill has proved against the estate of the person for whose accommodation the bill was accepted, there can be no further proof by any one to whom the bill is returned, nor by the accommodation acceptor when he pays it.(u)

The mode of adjusting the accounts between two estates where there had been mutual accommodation paper, a cash balance, and a mutual bankruptcy, has much embarrassed the Courts. Various accommodation transactions had for many years taken place between Caldwell and Co. and the Brownes. The former were the bankers of the latter. A commission of bankruptcy issued against Caldwell and Co., in March, 1793, and in the same month the Brownes became bankrupt. An account was then taken of the mutual debts and credits. That account consisted first of a cash account, which included good bills, as well as payments in cash; and, secondly, of a bill account, which related exclusively to bills which had been passed [366] by one house to the other, and which were all ultimately *dishonored. The result was, that on the cash account the Brownes were indebted to Caldwell and Co. in the sum of 40,716*l.*, and that, on the bill account, Caldwell and Co. had received from

(s) Ibid.

(t) Ex parte Beaufoy, Cooke's Bank. L. 180; Ex parte Lord Clanricarde, Ibid. 182; In re Bowness and Padmore, Ibid. 183; Ex parte Bloxham, 8 Ves. 531; Sarratt v. Austin, 4 Taunt. 200; Rose, 112, S. C. See Ex parte Solarte, 2 D. & C. 261.

(u) Ex parte Read, 1 G. & J. 224.

the Brownes bad bills, to the amount of 305,149*l.* 19*s.* 10*d.*, and the Brownes had received from Caldwell and Co. bad bills to the amount of 204,910*l.* 5*s.* Of the bad bills received from Caldwell and Co., the Brownes had negotiated bills to the amount of 196,589*l.* 6*s.* 4*d.*, and of those received from the Brownes, Caldwell and Co. had negotiated bills to the amount of 126,855*l.* 11*s.* 10*d.*, having retained the residue, viz., 178,294*l.* 8*s.*, at the request of the Brownes. All the bills received by the Brownes were discountable, and upon most of them they had received the full value, and Caldwell and Co. had no consideration for them, but the bad bills received from the Brownes. All the bills (or nearly so) which the Brownes had negotiated were proved against the estate of Caldwell and Co., and by far the greater part against the estate of the Brownes also; but to a larger amount, viz., 80,000*l.*, the Brownes had deposited bills as a security for the payment of a much smaller sum, so that the proof against them in respect of those bills was only for the sum really due, whereas, against Caldwell and Co., the proof was for the whole sum payable on the bill; and the consequence of this, and of the unequal negotiation of each other's bills, was, that a much larger sum was proved against Caldwell and Co., in respect of bills negotiated by the Brownes, than against the latter, in respect of bills negotiated by the former. Caldwell and Co., on petition, claimed the right to prove the bills which still remained in their hands, in order to be reimbursed the difference. But Lord Loughborough, C., said, "Till Caldwell and Co. pay all the creditors of Browne, who are likewise creditors of theirs, 20*s.* in the pound, they would be, by proving, sharing with the creditors of Browne, who are likewise creditors of theirs. If I allow this petition, I must do two things that are quite impossible. I must hold that the bankruptcy creates a debt which did not exist antecedently; and I must hold, that the same debt may be proved twice." The proof was confined to the balance of the cash account only.^(v) Where a petition was presented by the assignees of a bankrupt, the object of which was to prove, not only for the cash balance between the two bankrupts' estates, but also in respect of the dishonored bills, upon an issue of cross paper dishonored on both sides, part of which having been negotiated, was proved by the holders against both estates, Lord Ellenborough, C., said, "Upon consideration of *the case, *Ex parte Walker*, it struck me, that there were but two ways of taking it, as be- [*367]

(v) *Ex parte Walker*, 4 Ves. 373.

tween the two estates, either to consider all the bills as struck out of the case entirely, as issued for a bad purpose, like gambling transactions, &c., upon which there could be no proof, or to consider them all as good bills. I do not see that there is a middle course." The order was pronounced, that the petitioners should be at liberty to prove the cash balance only. (*w*) In the case of *Ex parte Rawson*, (*x*) Lord Eldon said, "I think that I argued the case of *Ex parte Walker*, and I must say, that the speculations about paper certainly outran the grasp of the wits of the Courts of justice. This sort of circulating medium puzzled as able a man as ever sat here, Lord Thurlow. I remember the first case of it. It was then small in amount, one bill and another. He then considered the acceptance of the one as a consideration for the other, and allowed both to prove, but then there was this difficulty, that it lessened the fund for paying the holder of the bill, and thus, by proving, they prejudiced their own creditors. It was found this would not do; and then it was said, 'If you will prove, you must first take up your acceptance, which got rid of the objection of the party proving in competition with his own creditor.' Then came the case of those houses at Liverpool and Manchester, drawing on one another to the amount of 50,000*l*. What was to be done then? The Court were puzzled and distressed. At last, however, we came to a sort of anchorage in that case, *Ex parte Walker*; I have no difficulty in saying that I never understood it. I am satisfied, that though no doubt the Court understood that judgment, yet none of the counsel did. The decision was this: that where there are cross bills drawn for accommodation, they are all to be thrown out of the account on both sides, and it is to be taken as if it were a cash balance only. If this were upon the principle that applies to one or two bills, that they are not to be proved by one estate against the other till all the creditors of both are paid, I could understand it. If there be 1000*l*. of acceptances on the one side, and 10,000*l*. on the other, Lord Loughborough says, that they are not to be regarded at all; that it is all chance how the two estates may pay. I say not; and if there be a surplus of one estate to satisfy the other, why should it not be implied? Look at the case of partnership; a party cannot prove against the estate of his copartner, so as to affect the creditors of both, but he may be paid his demand out of the surplus, if there is any. I do not see why the same rule is not to be applied here. I cannot bring myself to think

(*w*) *Ex parte Earle*, 5 Ves. 833.

(*x*) 1 Jacob, 274.

that the case of **Ex parte Walker* is right, if there is a surplus." In the following case there were no cross bills, but [*368] dishonored bills on one side were struck out of the account. Palmer received from Williamson, in cash and bills, 6424*l.* 9*s.* 3*d.*, and Williamson received from Palmer, in cash, 5824*l.* 19*s.* 7*d.* Both became bankrupt. Palmer had negotiated the bills, some of which, drawn by Williamson, to the amount of 1098*l.*, were refused acceptance, and were proved under both commissions. Palmer's assignees contended, that 1098*l.* should be deducted from the 6424*l.* 9*s.* 3*d.*, which would reduce the sum received by him, and would leave a balance of 498*l.* 10*s.* 4*d.* in his favor, which they petitioned to be allowed to prove against Williamson's estate. Lord Eldon, C., after considering how the question would stand, in case the parties had not become bankrupt, said, "If between these parties, considered as solvent, Williamson is entitled to say Palmer should not have the 498*l.* until he had restored the bill, being put into his hands as a medium of raising money, and the first obligation was upon Palmer, what difference does the bankruptcy make? No other difference than this, that the assignees of Williamson protect his estate against any liability upon the bill. Palmer's estate is entitled to a dividend upon the sum of 498*l.*, that is, in order to keep the account finally right, Williamson's estate is entitled to retain the dividends due to Palmer's estate, to the extent of making them applicable to protect the estate of Williamson against the bill." "To alter this decision," added his Lordship, "it must be shown, not only that the bills were accepted by Goodenough (the drawee), but that they were accepted on account of what the acceptor owed to Williamson."*(y)* At the time of the bankruptcy of Lynn, the account between him and the petitioner, Read, stood thus: there was a cash balance of 3576*l.* 8*s.* 4*d.*, including therein a sum of 1603*l.* 17*s.* 5*d.* for premiums of insurance, and commission due from Lynn to Read, and Lynn had given his promissory note for the said sum of 1603*l.* 17*s.* 5*d.* to Read, who had negotiated it, and it was proved under the commission. Read had accepted, for the accommodation of Lynn, bills drawn by Lynn to the amount of 6444*l.* 7*s.* 4*d.*, none of which had been paid at the bankruptcy, and they were proved under the commission. Read had likewise guaranteed debts of Lynn to the amount of 773*l.* 1*s.* 5*d.*, but had not at the bankruptcy paid any part of those debts, and they were proved under the commission. Lynn had given three bills for 1000*l.* each, drawn by him

(*y*) *Ex parte Metcalfe*, 11 Ves. 404.

on Stalker, to Read, who had negotiated them, and those bills were dishonored, and two of them were proved. The petitioner *being [*369] insolvent, made a composition, and paid the holders of the bills accepted for Lynn's accommodation, and the parties whose debts were guaranteed, a composition, amounting to 4894*l.* 8*s.* 8*d.* The petition prayed that the unpaid bills or liabilities might be excluded from both sides of the account, or that the petitioner might debit Lynn's account with the cash balance of 3576*l.* 8*s.* 4*d.*, and with the balance or difference between the amount of dividends paid by Lynn's estate upon Stalker's bills and Lynn's promissory note, and the amount of the commission paid by the petitioner, and that he might be admitted to prove the balance of the account, according to the declaration of the Court. Sir John Leach, V. C., "It is not necessary to refer to *Ex parte Walker* and *Ex parte Earle*,^(z) inasmuch as the act of 49 Geo. 3, has introduced a new principle, by which cases of this sort must now be tried. By this act, a surety paying after the bankruptcy can only prove against the estate of the bankrupt where the creditor has not proved, or stand in the place of the creditor on the bankrupt's estate, where the creditor has proved, and there cannot be double proof. Let the case of the accommodation bills be first tried by this principle. Read accepts, for the accommodation of the bankrupt, bills to the amount of 6444*l.*, which remains wholly unpaid at the time of the bankruptcy. These bills are all proved by the holders, under the commission, and, if Read were now to pay these bills, it would form no ground of further proof, and all that Read could claim would be, to have the benefit of the proofs already made upon these bills against the estate. With respect to the cash balance, that part of it which is represented by the promissory note of 1603*l.*, is already proved against the estate by the holder of the note, with whom the petitioner had discounted it, and the actual payment by the petitioner could not give him a larger right than to have the benefit of that proof. The remainder of the cash balance is more than covered by the two bills of Stalker, which have been proved against the bankrupt's estate by the holders with whom the petitioner negotiated them. It is hardly necessary to refer to the debts, amounting to 773*l.*, which were guaranteed by the petitioner, but which have been proved by the creditors against the bankrupt's estate." Petition dismissed.^(a) The latest case upon this intricate

(z) See *supra*.

(a) *Ex parte Read*, 1 G. & J. 224.

subject is *Ex parte La Foreste*,^(b) in which there was a cash balance between two bankrupt houses, and an account of mutual accommodation bills dishonored. *And the cash balance alone was admitted to be proved. And it was said, that Lord Eldon's dis-^[*370]satisfaction to *Ex parte Walker*, applied only in case there was a surplus of the estates: in which case, as between two partners after payment of the common creditors of both, the equities of the houses should be adjusted out of the surplus estate. This decision was appealed from, but on account of the small amount of the estate the appeal was not prosecuted, and the case seemed still very confused.

Perhaps the result is, that when the bills remain in the hands of the bankrupts, the cash balance is the debt, but when they have been negotiated the doctrine in *Ex parte Read* applies.

When accommodation bills are in the hands of a third party, for a valuable consideration, he may prove the whole of each bill upon the estate of each of the parties to it, and receive dividends as far as the amount due to him.^(c)

Before the 6 Geo. 4, c. 16, interest on a bill was not provable unless payable on the face of it,^(d) and no interest after the act of bankruptcy could be proved at all.^(e) But that act^(f) enabled the holder to prove, on overdue bills or notes, for interest down to the date of the fiat at the rate usually allowed by the Court of Queen's Bench.^(g) The present general act, 12 and 13 Vict. c. 106, s. 180, allows interest at 4*l.* per cent. down to the time of filing the petition.

The assignees may recover interest as if no bankruptcy had happened.^(h)

Other expenses, such as protesting, re-exchange, &c., if recoverable

^(b) 2 D. & C. 199; 1 M. & B. 363, S. C.

^(c) *Ex parte King*, Cook's B. L. 177; *Ex parte Lee*, 1 P. Wms. 782; *Ex parte Crossley*, 3 Bro. 237; *Ex parte Bloxham*, 6 Ves. 449, 600; 8 Ves. 531; *Fentum v. Pocock*, 5 Taunt. 192, E. C. L. R. vol. 1; 1 Marsh. 14, S. C.; *Jones v. Hibbert*, 2 Stark. 304, E. C. L. R. vol. 3; *Bank of Ireland v. Beresford*, 6 Dow. 233.

^(d) *Ex parte Marlar*, 1 Atk. 150.

^(e) *Ex parte Moore*, 2 Bro. C. C. 597.

^(f) Sect. 57.

^(g) As to subsequent interest where there is a surplus, see 13 Ves. 573; *Ex parte Higginbotham*; *Ex parte Paton*, 1 Glyn & Jam. 332.

^(h) *Pott v. Beavan*, 7 M. & G. 604, E. C. L. R. vol. 49.

in an action, and if incurred before the act of bankruptcy, are provable.(i)

[*371] *Under separate adjudications of bankruptcy against different parties to a bill or note, the holder may prove the whole amount of the money due to him upon the bill or note, at the time he makes his proof, and receive dividends under each upon the sums proved, until he shall, altogether, have received the whole amount. "In cases of bills or notes," says Lord Hardwicke, "where there is a drawer, and, perhaps, several indorsers, suppose two of these persons become bankrupts, the holder may prove his whole debt under each commission, and is entitled to receive satisfaction out of both estates, according to the dividends to be made, until he has received satisfaction for his whole debt; for he has a double security, and it is neither law nor equity to take it from him. But if, before the bankruptcy of one, he had received payment of part from the other, he could only have proved the residue under the latter bankruptcy, as the form of proving his debt shows, because no more would remain due to him."(k) And not only if any part of a bill have been received by the holder, before he have actually proved it upon the estate of a party, but even if a dividend under another commission have been merely *declared*, he can only prove for the residue.(l)

Where the creditor knowingly holds the joint and separate security of partners for the same debt, he cannot prove both on the joint and separate estate.

Where a creditor proves a debt, and holds certain bills of exchange or promissory notes, as securities, if any of them be afterwards paid to him, the amount of such payment must be expunged from the proof, and the future dividends will be paid on the residue only.(m)

(i) Anon. 1 Atk. 140; Ex parte Moore, 2 Bro. C. C. 597; Ex parte Hoffman, Co. B. L. 194; Francis v. Rucker, Ambler, 672. In the first and last of these cases, the expenses had been incurred after the act of bankruptcy and before the commission.

(k) Ex parte Wildman, 1 Atk. 109; 2 Ves. 113, S. C.; Ex parte Par. 11 Ves. 65; 1 Rose, 76, S. C.

(l) Cooper v. Pepys, 1 Atk. 106; Ex parte Leers, 6 Ves. 644; Ex parte The Royal Bank of Scotland, 19 Ves. 310; Ex parte Worrall, 1 Cox, 309; see, however, In re Gibson and Johnson, cited 19 Ves. 311, and Ex parte De Tastet, 1 Rose, 16.

(m) Ex parte Smith, Cook's B. L. 175, 191; Ex parte Barratt, 1 Glyn & J. 327; Ex parte Bloxham, Cook's B. L. 176; Ex parte Burn, 2 Rose, 55; Ex parte Rufford, 1 G. & J. 41. See further as to the mode of dealing with bills which have been deposited as a security, Ex parte Baldwin, 19 Ves. 230; Ex parte Towgood,

Where a creditor holds a bill as a security for a smaller sum than the amount of the bill, he may prove under a fiat against any parties to the bill, except against the party who deposited the bill with him, the whole amount of the bill, provided he does not receive more than twenty shillings in the pound on the debt due to him from the depositor of the bill.⁽ⁿ⁾

*A holder who has bought up the notes or acceptances of the bankrupt after the bankruptcy, will be admitted to prove,^(o) [*372] provided that, at the time of the bankruptcy, they were in the hands of persons entitled to prove.^(p)

If a trader deny himself to the holder of a bill on the morning of the day when it is payable, though the trader pay it the same day, that is an act of bankruptcy.^(q)

A bill of exchange is a chattel, the fraudulent transfer of which is an act of bankruptcy within the 6 Geo. 4, c. 16, s. 3,^(r) and 12 & 13 Vict. c. 106, s. 67.

A bill of exchange, amounting to 50*l.*, is a good petitioning creditor's debt, though it be not due,^(s) and that against the drawer, though, after the bankruptcy, it be duly presented and paid by the acceptor.^(t) Interest cannot be reckoned, for this purpose, as part of the debt unless specially made payable on the face of the bill.^(u)

19 Ves. 229; *Ex parte Rushworth*, 10 Ves. 419; *Ex parte Rufford*, 1 G. & J. 41; *Ex parte Brown*, 1 G. & J. 407.

⁽ⁿ⁾ *Ex parte King*, Co. B. L. 177; *Ex parte Crossley*, 3 Bro. C. C. 237; Co. B. L. 177, S. C.; *Ex parte Bloxham*, 5 Ves. 449; see *Ex parte Reader*, Buck. 381.

^(o) *Ex parte Lee*, 1 P. Wms. 782; *Ex parte Atkins*, Buck. 479; *Ex parte Deey*, 2 Cov. 423; *Ex parte Brymer*, Co. B. L. 187; *Ex parte Thomas*, 1 Atk. 73; *Joseph v. Orme*, 2 N. R. 180; *Meade v. Braham*, 3 M. & Sel. 91; *Cowley v. Dunlop*, 7 T. R. 565; *Houle v. Baxter*, 3 East, 177.

^(p) *Ex parte Rogers*, Buck. 490; see *Ex parte Dickinson*, 3 D. & C. 520; *Ex parte Bolton*, 1 M. & Bli. 412. See the Chapter on *Transfer*.

^(q) *Colkett v. Freeman*, 2 T. R. 59; and see *Bleasby v. Crossley*, 2 C. & P. 213, E. C. L. R. vol. 12.

^(r) *Cumming v. Bailey*, 6 Bing. 363, E. C. L. R. vol. 19; 4 Moo. & P. 39, S. C.

^(s) And so now as to any other debt of sufficient amount, though not due and not secured by any writing, 5 & 6 Vict. c. 122, s. 9, repealed and re-enacted by the 12 & 13 Vict. c. 106, s. 91.

^(t) *Ex parte Douthat*, 4 B. & Ald. 67, E. C. L. R. vol. 6. But a bill at maturity must be presented and due notice given to the drawer, or it will not constitute a good petitioning creditor's debt against him. *Cooper v. Machin*, 1 Bing. 426, E. C. L. R. vol. 8; 1 Moo. 536, S. C.

^(u) *Cameron v. Smith*, 2 B. & Ald. 305; *In re Burgess*, 8 Taunt. 660, E. C. L. R. vol. 4; 2 Moo. 745; Buck. 412.

Though a bill be for the exact sum of 50*l.*, and not due at the time of the act of bankruptcy, the rebate of interest will not make it an insufficient petitioning creditor's debt.^(v) Where there is a specific exchange of accommodation acceptances, and before the bills are at maturity, one of the parties commits an act of bankruptcy, it has been held that the bankrupt's acceptance is not a sufficient debt to support a commission, until the petitioning creditor has paid his own acceptance.^(w) Where an acceptor, for the accommodation of the bankrupt before an act of bankruptcy, paid the amount after [373] an act of bankruptcy, it was held, that this payment being after an act of bankruptcy, did not support the commission.^(x) A bill or note which cannot be sued on at law,^(y) or against law proceedings on which equity will enjoin, is not a good petitioning creditor's debt.^(z)

It was at one time doubtful whether, if a bill existing before the act of bankruptcy were indorsed to the petitioning creditor after the act of bankruptcy, the indorsee would be entitled to a commission.^(a) But it is now clear that such a debt is sufficient. The debt on which the fiat is issued must have existed before the act of bankruptcy, but need not have existed in the petitioning creditor before it; the indorsee represents his indorser.^(b) But it must appear that there was a good petitioning creditor's debt in the petitioner at the time of petition, and therefore it must be shown that the bill or note was indorsed

(v) Brett v. Levett, 13 East, 213; 1 Rose, 112, S. C.

(w) Sarratt v. Austin, 4 Taunt. 200; 2 Rose, 112, S. C.

(x) Ex parte Holding, 1 G. & J. 97.

(y) Richmond v. Heapy, 1 Stark. 202, E. C. L. R. vol. 2; Buckland v. Newsame, 1 Taunt. 477; 1 Camp. 474, S. C.

(z) Ex parte Page, 1 G. & J. 100.

(a) Ex parte Lee, 1 P. Wms. 782.

(b) Ex parte Thomas, 1 Atk. 73; Anon. 2 Wils. 135; Bingley v. Maddison, 1 Co. B. L. 32; Glaister v. Hewer, 7 T. R. 498. Before the year 1806, the petitioning creditor's debt must have existed before *any act* of bankruptcy, on the principle that a man who has committed any act of bankruptcy, has no power to contract so as to bind his estate. But it was provided by the 46 Geo. 3, c. 136, s. 5, that the commission should not be defeated by an act of bankruptcy prior to the petitioning creditor's debt, of which act of bankruptcy the petitioning creditor had no notice. That statute is repealed by the 6 Geo. 4, c. 16, the 19th section of which latter act, and the 12 & 13 Vict. c. 106, s. 88, provides that no commission shall be invalidated by an act of bankruptcy prior to the petitioning creditor's debt, provided there be a sufficient act of bankruptcy after it.

According therefore to the latter statute notice to the petitioning creditor of the prior act of bankruptcy is in many cases immaterial.

to the petitioner before he petitioned.(c) If, at the time of the act of bankruptcy, a bill given to a creditor were outstanding in the hands of an indorsee, neither the original debt due to the creditor, nor the bill will enable the creditor to support a fiat.(d) When a bill or note is given the wife dum sola, the husband alone may petition for a commission.(e) The petitioning creditor's debt must have been contracted, or must have existed while the bankrupt was a trader.(f)

The date appearing on the bill has been held *prima facie* evidence *that it existed before the act of bankruptcy.(g) But when [*374] in an action by assignees of a bankrupt, they produce a bill or note of the bankrupt as evidence of a petitioning creditors debt, they must show by extrinsic evidence that the instrument existed before the act of bankruptcy.(h) From the date of the drawing or making the date of an indorsement cannot be inferred.(i)

A course of drawing and redrawing bills of exchange, for the sake of the profit, is a trading within the Bankrupt Laws. Thus, where A. was agent for several regiments for the space of six years, and drew bills upon B., who was likewise an agent in Dublin, to the amount of 281,000*l.* and upwards, and B. redrew to the amount of 290,000*l.* and upwards, on A., but there was no commission money allowed on either side, it was held that a drawing and redrawing such large sums, and a continuation of it, was a trading, though no commission money was allowed on either side, and notwithstanding a loss ensued by these transactions to the bankrupt.(k) But the mere circumstance of drawing, accepting, or indorsing bills, or even an

(c) *Rose v. Rowcroft*, 4 Camp. 245.

(d) *Ex parte Botten*, 1 Mont. & Bl. 412; *Ex parte Magnus*, 11 L. J., Bank. 32.

(e) *Ex parte Barber*, 1 G. & J. 1; *McNeillage v. Holloway*, 1 B. & Ald. 218.

(f) *Bailie v. Grant*, 9 Bing. 121, E. C. L. R. vol. 23.

(g) See ante, Chapter on *Evidence*; *Goodtitle v. Milburn*, 2 M. & W. 853; **Sinclair v. Baggaley*, 4 M. & W. 312; **Smith v. Battens*, 1 Mood. & R. 341; *Taylor v. Kinloch*, 1 Stark. 175, E. C. L. R. vol. 2; *Obbard v. Betham*, M. & M. 483; *Potez v. Glossop*, 2 Ex. Rep. 195; **Davis v. Lowndes*, 7 Scott, N. Rep. 195; *Malpas v. Clements*, 19 L. J. 435, Q. B.

(h) *Wright v. Lainson*, M. & W. 739; *6 Dowl. 146, S. C.; and see *Anderson v. Weston*, 6 Bing. N. Ca. 296, E. C. L. R. vol. 37; 8 Scott, 583, S. C.; and ante, p. 57; *Fletcher v. Manning*, 12 M. & W. 571.

(i) *Rose v. Rowcroft*, 4 Camp. 245; *Cowie v. Harris*, M. & M. 141.

(k) *Richardson v. Bradshaw*, 1 Atk. 128; *Hankey v. Jones*, Cowp. 745; 1 Mont. 22; and see *Inglis v. Grant*, 5 T. R. 530, and *Ex parte Bell*, 15 Ves. 356.

occasional drawing or redrawing, for the sake of profit, will not subject a man to the Bankrupt Laws.^(l)

Bills remitted to an agent as a factor or banker, and entered short while unpaid, or paid in generally, to be received^(m) by such banker, or for any other specific purpose,⁽ⁿ⁾ and not discounted or treated as cash, are considered as still in the possession of the principal; and, therefore, in case of the bankruptcy of such agent, banker, or factor, they do not pass to his assignees, but must be returned to the principal, subject to such lien as the agent may have upon them. "Every man," says Lord Ellenborough, "who pays bills not due into the hands *of his banker, places them there, as in the hands of [*375] his agent, to obtain payment of them when due. If the banker discount the bill, or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it, pro tanto, for his advance."^(o) A customer was in the habit of indorsing and paying into his banker's hands bills not due, which, if approved, were immediately entered as bills to his credit, to the full amount; and he was then at liberty to draw for that amount by checks on the bank. The customer was charged with interest upon all cash payments to him, from the time when made, and upon all payments by bills from the time when they were due and paid, and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupts, it was held, that the customer might maintain trover against their assignees for bills paid in by him, and remaining *in specie* in their hands, the cash balance, independently of the bills, being in favor of the customer at the time of the bankruptcy; Bayley, J., observing, "It has been argued for the defendants, that we must infer

^(l) Hankey v. Jones, Cowp. 745; see Hamson v. Harrison, 2 Esp. 555.

^(m) See Jombart v. Woollett, 2 M. & C. 389; Ex parte Edwards, 11 L. J. Bank. 36.

⁽ⁿ⁾ Belcher v. Campbell, 8 Q. B. Rep. 11.

^(o) Giles v. Perkins, 9 East, 12; see Ex parte Dumas, 1 Atk. 232; 2 Ves. sen. 582, S. C.; Zinck v. Waller, 2 Bl. 1154; Bolton v. Puller, 1 B. & P. 539; Ex parte Sargeant, 1 Rose, 153; Ex parte Sollers, 18 Ves. 229, S. P.; Ex parte Pease, 1 Rose, 232; Ex parte Wakefield Bank, 1 Rose, 242; Carstairs v. Bates, 3 Camp. 301; Ex parte M'Gae, 2 Rose, 376; Ex parte the Leeds Bank, 1 Rose, 254; 19 Ves. 25, S. C.; Ex parte Rowton, 17 Ves. 426; 1 Rose, 15, S. C.; Ex parte Buchanan, 1 Rose, 280; 2 Rose, 162; Ex parte Waring, 2 Rose, 182.

an agreement to have been made between the banker and his customer, that, as soon as bills reached the hands of the banker, the property should be changed. Undoubtedly, if there were any such bargain, the defendants would be entitled to our judgment; but, if there be no such bargain, then the case of customer and banker resembles that of principal and factor; and the bills, remaining in the banker's hands *in specie*, will, notwithstanding the bankruptcy of the banker, continue the property of the customer. Though the amount of the bills was carried into the cash column, it does not follow that the customer assented to their being considered as cash."(*p*) The assignees may be restrained by injunction from negotiating the bills.(*q*)

The Bankrupt Act, 12 & 13 Vict. c. 106, s. 125, enacts that if at the time of the bankruptcy the bankrupt *have, by the consent of the true owner, in his possession, order, or disposition, [³⁷⁶] any goods or chattels whereof he was reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition as owner, the Court shall have power to sell them for the benefit of the creditors.

This section applies not only to things in possession, but to things in action, as bonds, policies, and other debts.(*r*)

Where a creditor assigns a debt not assignable at law, and then becomes a bankrupt, the general rule is, that the debt so assigned passes nevertheless to the assignees in bankruptcy, as being in the order and disposition of the bankrupt, with the consent of the true owner, unless the debtor have had notice of the assignment. It is, however, sufficient if the assignee of the debt do all he can to give notice, or despatch a notice, before the bankruptcy, though it be not received by the debtor till after the bankruptcy.(*s*) A debt, in order to pass to the assignees within this section, must have been *unconscientiously* allowed to remain in the hands of a bankrupt.(*t*)

Bills or notes may pass to the assignees under the doctrine of reputed ownership.(*u*) A person, having three bills of exchange, applied to a country banker, with whom he had had no previous dealings, to give

(*p*) *Thompson v. Giles*, 2 B. & C. 422, E. C. L. R. vol. 9; 3 Dowl. & R. 733, S. C.

(*q*) *Ex parte Jombart*, Cor. Vice C. Dec. 1836.

(*r*) *Ryall v. Rolle*, 1 Ves. 348; 1 Atk. 165, S. C.

(*s*) *Belcher v. Bellamy*, 17 L. J., Ex. 219; 2 Exch. Rep. 303, S. C.

(*t*) See *Joy v. Campbell*, 1 Sch. & Lef. 336, and *Load v. Green*, 15 M. & W. 216.*

(*u*) 6 Geo. 4, c. 16, s. 72.

for them a bill on London for the same amount; and the bill given by the banker was afterwards dishonored. Held, that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange; and that, *if the exchange has not been complete*, still that, the banker, having become a bankrupt, and the three bills having come to the possession of his assignees, *must be considered as goods and chattels in the order and disposition of the bankrupt, at the time of the bankruptcy, within the meaning of the Bankrupt Act*. "These bills," says Abbott, C. J., "being negotiable securities, of which the bankrupts might dispose, and having remained in their possession till the time of the bankruptcy, and so come to their assignees, are, in my opinion, within the operation of the statute. It has been held, that *debts* are within the statute; if so, a fortiori, bills of exchange must be."(*v*)

But a bill or note in the hands of an agent for a specific purpose does not pass to his assignees by reputed ownership.(*w*)

[*377] *The debtor's knowledge of the assignment is not necessary where a negotiable bill or note is indorsed or transferred, for the legal title to the debt is conveyed by the indorsement or delivery. But if a man who afterwards becomes bankrupt, indorses a bill or note not negotiable, unless the debtor have notice, the bill or note passes to the bankrupt's assignees by reputed ownership.(*x*)

The effect of bankruptcy of the husband on the choses in action of his wife has been discussed in a previous Chapter.(*y*)

If the holder of a bill become bankrupt, the property in the bill vests, from the time of the act of bankruptcy,(*z*) in his assignees, and they must indorse.(*a*)

But if the money were received by the creditor before the commission issued, then an indorsement by the bankrupt would, under the late General Bankrupt Act, have been protected as a payment

(*v*) *Hornblower v. Proud*, 2 B. & Ald. 327; see *Bryson v. Wylie*, 1 B. & P. 83, n.

(*w*) *Bruce v. Hurly*, 1 Stark. 23, E. C. L. R. vol. 2; *Belcher v. Campbell*, 8 Q. B. Rep. 1, E. C. L. R. vol. 55; see *Took v. Hollingworth*, 5 T. Rep. 215.

(*x*) *Belcher v. Campbell*, 8 Q. B. Rep. 1, E. C. L. R. vol. 55.

(*y*) Chapter V.

(*z*) Subject, of course, to the new provisions as to notice of the act of bankruptcy.

(*a*) *Pinkerton v. Marshall*, 2 H. Bla. 335; *Thomason v. Frere*, 10 East, 418; but see now 2 & 3 Vict. c. 29.

by the bankrupt.(b) "There is no difference," says the Lord Chancellor, "between an actual payment of money in satisfaction of a debt, and indorsing bills of exchange, provided the money was received on them before the commission of bankruptcy issued; for I should take that only as a medium of payment and no more; otherwise it would be very hard."(c) And it has been held, that if a bill of exchange be indorsed in payment of *goods sold*, it will be a payment within the statute, though the bill be not paid till after the issuing of the commission, provided it be paid when due.(d)

The distinction between a payment in money and a payment or satisfaction by bills, is, however, now of little moment, since now not only payments, but all dealings without notice of an act of bankruptcy, are protected.(e)

Where a negotiable instrument is given to the bankrupt after his bankruptcy, the bankrupt has the property in it, unless the assignees choose to interfere.(f)

*If a bankrupt be payee of a negotiable bill or note, the acceptor or maker cannot dispute his capacity to indorse.(g) [*378]

As, in general, property in which a bankrupt has no *beneficial interest*, does not pass to his assignees; he may, after an act of bankruptcy, indorse a bill accepted for his accommodation, so as to convey to his indorsee a right of action against the accommodation acceptor.(h)

The certificate of the bankrupt discharges him from all debts due when he became bankrupt, and from all claims and demands provable under the bankruptcy.(i) And an agreement to pay a debt from

(b) 6 Geo. 4, c. 16, s. 82; and also under 2 & 3 Vict. c. 29.

(c) *Hawkins v. Penfold*, 2 Ves. sen. 550.

(d) *Wilkins v. Casey*, 7 T. R. 711; *Bayly v. Schofield*, 1 M. & Sel. 338; see *Bishop v. Crawshay*, 3 B. & C. 415, E. C. L. R. vol. 10; 5 Dowl. & R. 279.

(e) The form of pleading may still be affected.

(f) *Drayton v. Dale*, 2 B. & C. 293, E. C. L. R. vol. 9; 3 Dowl. & R. 534.

(g) *Drayton v. Dale*, 2 B. & C. 293, E. C. L. R. vol. 9; *Pitt v. Chappelow*, 8 M. & W. 616; * *Braithwaite v. Gardiner*, 8 Q. B. Rep. 473, E. C. L. R. vol. 55. See the Chapter on *Acceptance*.

(h) *Arden v. Watkins*, 3 East, 317; *Wallace v. Hardacre*, 1 Camp. 45; *Ramsbottom v. Cator*, 1 Stark. 228, E. C. L. R. vol. 2.

(i) 12 & 13 Vict. c. 106, s. 200.

which the bankrupt has been so discharged was formerly void, unless in writing and signed.(*k*) But an absolute written and signed promise personally to pay, bound, whether given before or after certificate.(*l*) But now a subsequent contract to pay is avoided.(*m*)

If a trader, by way of fraudulent preference, transfer a bill to his creditor, that is an act of bankruptcy; but if he by way of fraudulent preference, pay his creditor in money, that is not, it should seem, an act of bankruptcy, but the payment is void as a fraud on the Bankrupt Laws.(*n*)

Until the 6 Geo. 4, c. 16, s. 3, fraudulent preference (except by deed) was not prohibited by any statute, but was void as a fraud on the Bankrupt Laws.(*o*) If by deed, it was an act of bankruptcy.(*p*)

But now, by the 6 Geo. 4, c. 16, s. 3, repealed and re-enacted by the 12 & 13 Vict. c. 106, s. 67, every fraudulent conveyance or transfer, whether of real property or chattels (though not by deed) is erected into an act of bankruptcy. And a bill of exchange has been decided to be a chattel within this, as well as within other sections of the Bankrupt Act.(*q*)

To be invalid as a fraudulent preference, a transfer or payment
[*379] *must have been spontaneous, and not at the instance or opportunity of the creditor; it must have been with the intention of giving the creditor an unfair advantage, and not in the usual course of business;(*r*) it must have been in contemplation of bankruptcy as a probable event.(*s*)

But money is not, perhaps, a chattel within this section, and there-

(*k*) 6 Geo. 4, c. 16, s. 131.

(*l*) Kirkpatrick v. Tattersall, 13 M. & W. 766; * Lobb v. Stanley, 5 Q. B. Rep. 574, E. C. L. R. vol. 48.

(*m*) 12 & 13 Vict. c. 106, s. 204.

(*n*) See post.

(*o*) Martin v. Pewtress, 4 Bur. 2477.

(*p*) 1 Jac. 1, c. 15, s. 2; Bevan v. Nunn, 9 Bing. 107, E. C. L. R. vol. 23; 2 Moo. and Sc. 132.

(*q*) Cumming v. Bailey, 6 Bing. 363, E. C. L. R. vol. 51; 4 Moore & P. 36, S. C. Quære as to a country bank note. Carr v. Burdiss, 1 C. M. & R. 782; 5 Tyrw. 309, S. C. See post.

(*r*) Rust v. Cooper, Cowp. 629.

(*s*) Poland v. Glynn, 4 Bing. 22, E. C. L. R. vol. 13, n.; 12 Moo. 109, n., S. C. In Morgan v. Brundrett, 5 B. & Ad. 289, E. C. L. R. vol. 27; 2 Nev. & M. 280, S. C., Mr. Justice Parke said that the cases on this subject had gone too far, and that actual bankruptcy and not mere insolvency must have been contemplated, to make the preference fraudulent. And see Atkinson v. Brindall, 2 Bing. N. C. 225, E. C. L. R. vol. 29; 2 Scott, 369, S. C. But see Aldred v. Constable, 4 E. R. Rep. 685.

fore the payment of money by way of fraudulent preference to a creditor, is only a void payment.(t)

A voluntary transfer, without consideration, by a bankrupt, being at the time insolvent, of land, chattels, bills, bonds or notes, or debts, is avoided by the 12 & 13 Vict. c. 106, s. 126. A gift of money is not, it seems, within this section,(u) but if the money were given with a fraudulent intent, the payment is void and the money recoverable.(v)

*CHAPTER XXXVI.

[*380]

OF THE EFFECT OF A DISCHARGE UNDER THE ACTS FOR THE RELIEF OF INSOLVENT DEBTORS.

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The principal acts now in force for the relief of Insolvent Debtors are the 1 & 2 Vict. c. 110, amended by the 2 & 3 Vict. c. 39. .

The last general act for this purpose, before the 1 & 2 Vict. c. 110, was the 7 Geo. 4, c. 57, most of the provisions in which act are re-enacted by the 1 & 2 Vict. c. 110, without alteration, so that the decisions in the earlier statutes are, for the most part, applicable to the latter and existing one.(a)

(t) *Bevan v. Nunn*, 9 Bing. 107, E. C. L. R. vol. 23; 2 Moore & S. 132, S. C. ; and see *Abell v. Daniell*, M. & M. 370; *Ex parte Simpson*, 3 De Gex, 9; see also *Cannan v. Wood*, 2 M. & W. 467.* If A. & B. are both creditors for the same debt, a payment to A., with the intention of serving B., is not a fraudulent preference of A. *Abbott v. Pomfret*, 1 Bing. N. C. 462, E. C. L. R. vol. 27; 1 Scott, 470; 1 Hodges, 24, S. C. ; see *Reg. v. Radley*, 18 L. J. 184, Mag. Ca.

(u) *Abell v. Daniell*, M. & M. 370.

(v) *Ibid.*

(a) The 5 & 6 Vict. c. 116, effected a most important alteration in the law, enacting that any person, not being a trader, and any trader owing less than 300*l.*, might petition the Court of Bankruptcy for protecting from process, although he have not been to prison. The act was amended by the 7 & 8 Vict. c. 96, now in

The object of the act 1 & 2 Vict. c. 110, is to discharge the insolvent's person from all his debts on bills or notes mentioned in his schedule, whether the persons to whom those debts may have become due be named in the schedule or not, provided there be no fraudulent or intentional misdescription or concealment. *The act, (b) [*381] therefore, expressly discharges the insolvent from the claims of all persons not known to him at the time of the adjudication, who may be indorsees or holders of any negotiable security set forth in the schedule.

Under the Lords' Act, 32 Geo. 2, c. 28, now repealed by 1 & 2 Vict. c. 110, s. 119, it was held that, where the indorsee of a bill sued the acceptor, and charged him in execution, and the acceptor obtained his discharge under the Lords' Act, and the indorsee then sued the drawer, who, after paying the bill, sued the acceptor and charged him in execution again, that the acceptor was not discharged, because the first execution was not a satisfaction as between the drawer and acceptor. (c) This decision, however, proceeded on the limited scope of the Lords' Act, which only proposed to discharge a prisoner from jail, as to a particular pressing creditor, and not like the acts for the relief of the insolvent debtor, to discharge him from all his debts and liabilities. Therefore, a discharge by the Court for the relief of insolvent debtors has a much more extensive effect. An insolvent inserted in his schedule the name of the indorsee, but not of the drawer of the bill, and was discharged; afterwards the drawer took up the bill and sued the insolvent, who pleaded his discharge. It was held that the defendant was discharged. (d) It is conceived that a debtor discharged by the Court for the relief of insolvent debtors, from a bill which is at maturity, is discharged, not only as against the holder at the time of his schedule, but as against all subsequent transferees, and all parties who may take up the bill. (d)

Where there are two joint makers of a promissory note, the one part repealed by the 12 & 13 Vict. c. 106, which enables an insolvent *trader* to *petition* for protection, ss. 211 to 223. See as to the 7 & 8 Vict. c. 96, the case of Phillips v. Pickford, 19 L. J. 171; and as to 12 & 13 Vict. c. 106, ss. 211 and 216; Levy v. Horne, 19 L. J. 260, Exch.

(b) 1 & 2 Vict. c. 110, s. 75.

(c) M'Donald v. Bovington, 4 T. R. 825; and see the decisions on 49 Geo. 3, c. 115; Lucas v. Winton, 2 Camp. 443; Simpson v. Pogson, 3 Dow. & R. 567, E. C. L. R. vol. 16.

(d) Boydell v. Champneys, 2 M. & W. 433.*

a principal and the other a surety, and the principal is discharged by the Court for the relief of insolvent debtors, and the surety is obliged to pay the note, the surety may sue the principal notwithstanding his discharge.(e)

If the bill be substantially described in the schedule, an unintentional mistake in the description, either of the bill or of the parties to it, will not prejudice the insolvent.(f)

*But if the insolvent wilfully omit the name of an indorsee or holder, known by the insolvent to be so, he is not discharged.(g) [*382]

If the debt only be mentioned in the schedule, the debtor is not discharged from the bill. The bill or note should be mentioned, and the name of the holder, or it should be stated that the holder is not known.(h)

And if by mistake the debt be stated to be 3*l.* when it should be 7*l.*, as the consequence is to deprive the creditor of the benefit of the notice to creditors for 5*l.* and upwards, the debtor is not discharged.(i)

A notice to the creditor of the filing of the insolvent's petition and schedule, is not a condition precedent to his discharge, for the notice is the act of the Court.(k)

A discharge by the Court for the relief of insolvent debtors, though it discharge the person of the insolvent from liability, is no discharge of other parties to the bill, except to the amount of the sum received by the holder from the insolvent's estate.

The act 1 & 2 Vict. c. 110, s. 91, avoids any new contract or se-

(e) *Powell v. Easton*, 8 Bing. 23, E. C. L. R. vol. 21; 1 M. & Sco. 68, S. C.

(f) *Forman v. Drew*, 4 B. & C. 15, E. C. L. R. vol. 10; 6 D. & R. 75, S. C.; *Wood v. Jowett*, 4 B. & C. 20, E. C. L. R. vol. 10, n.; *Reeves v. Lambert*, Ibid. 214; *Nias v. Nicholson*, R. & M. 322; 2 C. & P. 120, E. C. L. R. vol. 12, S. C.; *Levy v. Dolbell*, M. & M. 202; *Boydell v. Champneys*, 2 M. & W. 433; * *Eastwood v. Brown*, R. & M. 312; *Cox v. Read*, Ibid. 199; 1 C. & P. 602, E. C. L. R. vol. 12, S. C.; *Sharp v. Gye*, 4 C. & P. 311, E. C. L. R. vol. 19.

(g) *Pugh v. Hookham*, 5 C. & P. 376, E. C. L. R. vol. 24; *Lewis v. Mason*, 4 C. & P. 322, E. C. L. R. vol. 19.

(h) *Beck v. Beverly*, 11 M. & W. 845; * *Tyers v. Stunt*, 7 Scott, 349; *Leonard v. Baker*, 15 M. & W. 202.*

(i) *Hoyles v. Blore*, 14 M. & W. 387.*

(k) *Reid v. Croft*, 5 Bing. N. Ca. 68, E. C. L. R. vol. 35; 6 Scott, 770; 7 Dowl. 122, S. C.

curity for payment of a debt from which the insolvent has been discharged under the act; therefore, a bill or note for a debt from which the insolvent has obtained his discharge, is void, and that, notwithstanding that it was made on some additional and good consideration.^(l)

But it has been held that an innocent indorsee, for value, without notice, before maturity of the instrument, may, notwithstanding, recover on such a note.^(m)

And a bill accepted partly for a debt, from which the acceptor has
[*383] been discharged by the Insolvent Debtors' Act, *and partly for a new debt, is good as to the new debt.⁽ⁿ⁾

A bill or note given in consideration of not opposing the insolvent's discharge, is void, except in the hands of an innocent indorsee for value.^(o)

(*l*) *Evans v. Williams*, 1 C. & Mees. 30; * 3 Tyr. 236, S. C.; *Ashley v. Killick*, 5 M. & W. 509.*

(*m*) *Northam v. Latouche*, 4 C. & P. 140, E. C. L. R. vol. 19; *Lucas v. Winton*, 2 Camp. 443; *Simpson v. Pogson*, 3 Dow. & R. 567, E. C. L. R. vol. 16. As to a warrant of attorney, see *Philpot v. Aslett*, 4 C. M. & R. 85; * *Best v. Barker*, 8 Price, 533; 3 Doug. 188, E. C. L. R. vol. 26, S. C.

(*n*) *Sheerman v. Thompson*, 11 Ad. & E. 1027, E. C. L. R. vol. 39; 3 Per. & Dav. 656, S. C.; *Denne v. Knott*, 7 M. & W. 143,* where one of several defendants has been discharged under the act; and see *Raynes v. Jones*, 9 M. & W. 104.*

(*o*) *Murray v. Reeves*, 8 B. & C. 421, E. C. L. R. vol. 15; 2 M. & Ry. 423, S. C.; *Rogers v. Kingston*, 2 Bing. 441, E. C. L. R. vol. 9; 10 Moore, 97, S. C.; *Horn v. Ion*, 4 B. & Ad. 78, E. C. L. R. vol. 24; 1 N. & M. 627, S. C.

APPENDIX.

*SECTION I.

[*385]

NOTARY'S FEES OF OFFICE.

As settled July 1st, 1799.

AT a meeting of several notaries of the City of London, held at the George and Vulture Tavern, in London aforesaid, on the 1st of July, A. D. 1797, the following resolutions were unanimously agreed to, and since approved and confirmed by the Governor and Company of the Bank of England :—

First.—That, from and after the fifth day of the present month of July, the noting of all bills drawn upon or addressed at, the house of any person or persons residing within the ancient walls of the said city of London, shall be charged one shilling and sixpence ; and without the said walls, and not exceeding the limits hereunder specified, the sum of two shillings and sixpence.

Second.—For all bills drawn upon, or addressed at, the house of any person or persons residing beyond Old, or New Bond Street, Wimpole Street, New Cavendish Street, Upper Marylebone Street, Howland Street, Lower Gower Street, lower end of Gray's Inn Lane (and not off the pavement), Clerkenwell Church, Old Street, Shoreditch Church, Brick Lane, St. George's in the East, Execution Dock, Wapping, Dockhead, upper end of Bermondsey Street (as far as the church), end of Blackman Street, end of Great Surrey Street, Blackfriars' Road (as far as the Circus), Cuper's Bridge, Bridge Street, Westminster, Arlington Street, Piccadilly, and the like distances, three shillings and sixpence ; and, off the pavement, one shilling and sixpence per mile additional.

Third.—For protesting a bill drawn upon, or addressed at, the house of any person or persons residing within the ancient walls of the said city (including the stamp duty of four shillings, and exclusive of the charge of noting), the sum of six shillings and sixpence ; and without the ancient walls of the said city, including the like stamp duty, and exclusive of the said charge of noting, the sum of eight shillings, agreeably to the second article.

*Fourth.—That all acts of honor, within the ancient walls of the city of London, shall be charged the said sum of one shilling [*386]

and sixpence upon each bill; and for all acts of honor without the ancient walls of the said city, to be regulated agreeably to the charge of noting bills out of the city, and the like charge for any additional demand that may be made upon the said bill, or when the same is mentioned and inserted in the answer in the protest.

Fifth.—*For every post, demand, and act thereof*, within the ancient walls of the said city, the sum of two shillings and sixpence; and without the walls of the said city, the sum of three shillings and sixpence (provided the same be only registered in the notary's book); and so in proportion, according to the distance, to be regulated agreeably to the charge of noting bills.

Sixth.—For every copy of bill paid in part, and a receipt at foot of such copy, shall be charged two shillings; and so in proportion for every additional bill so copied (exclusive of the receipt stamp).

Seventh.—For every duplicate protest of one bill (including four shillings for the duty), shall be charged the sum of seven shillings and sixpence, and so in like proportion of three shillings and sixpence (exclusive of the duty) for every additional bill.

Eighth.—For every folio of ninety words, translated from the French, Dutch, or Flemish, into English, or from the English into French, Dutch, or Flemish, two shillings for each such folio; and from Italian, Spanish, Portuguese, German, Danish, and Swedish, one shilling and ninepence per folio of ninety words; and from Latin, two shillings and sixpence per folio; and for attesting the same to be a true translation, if necessary, seven shillings and sixpence, exclusive of fees and stamps.

Ninth.—That all attestations to letters of attorney, affidavits, &c., at the request of any gentleman in the law, shall be charged seven shillings and sixpence, exclusive of fees, stamps, and attendance.

Tenth.—For every city seal shall be charged one guinea, for one deponent, exclusive of attendance and exemplification; and if more than one deponent, ten shillings and sixpence for each additional affidavit.

Eleventh.—For all notarial copies shall be charged sixpence per folio of seventy-two words, exclusive of attestation, stamps, &c.

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*SECTION II.

STATUTES.

[9 & 10 Wm. 3, c. 17.]

An Act for the better Payment of Inland Bills of Exchange. [1698.]

“Whereas great damages and other inconveniences do frequently happen in the course of trade and commerce, by reason of delays of payment, and other neglects on inland bills of exchange in this kingdom:” Be it therefore enacted by the king's most excellent Majesty, by and with the advice and

consent of the lords, spiritual and temporal, and the commons, in this present Parliament assembled, and by the authority of the same, that from and after the four-and-twentieth day of June next, which shall be in the year one thousand six hundred and ninety-eight, all and every bill or bills of exchange drawn in, or dated at and from, any trading city, or town, or any other place in the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, of the sum of five pounds sterling or upwards, upon any person or persons of or in London, or any other trading city, town, or any other place (in which said bill or bills of exchange shall be acknowledged and expressed the said value to be received), and is and shall be drawn payable at a certain number of days, weeks, or months after date thereof, that from and after presentation and acceptance of the said bill or bills of exchange (which acceptance shall be by the underwriting the same under the party's hand so accepting), and after the expiration of three days after the said bill or bills shall become due, the party to whom the said bill or bills are made payable, his servant, agent, or assigns, may and shall cause the said bill or bills to be protested by a notary public, and in default of such notary public, by any other substantial person of the city, town, or place, in the presence of two or more credible witnesses, refusal or neglect being first made of due payment of the same: which protest shall be made and written under a fair written copy of the said bill of exchange, in the words or form following:

Know all men, that I, *A. B.*, on the day of at the usual place of abode of the said have demanded payment of the bill, of the which the above is the copy, which the said did not pay, wherefore I the said do hereby protest the said bill. Dated this day of

II. Which protest so made, as aforesaid, shall within fourteen days after making thereof, be sent, or otherwise due notice shall be given thereof, to the party from whom the said bill or bills were received, who is, upon producing such protest, to repay the said bill or bills, together with all interest and charges from the day such bill or bills were protested; for which protest shall be paid a sum not exceeding the sum of sixpence; and in default or neglect of such protest made and sent, or due notice given within the days *before limited, the person so failing or neglecting thereof, is [*388] and shall be liable to all costs, damages, and interest, which do and shall accrue thereby.

III. Provided, nevertheless, that in case any such inland bill or bills of exchange shall happen to be lost or miscarried within the time before limited for payment of the same, then the drawer of the said bill or bills is and shall be obliged to give another bill or bills of the same tenor with those first given, the person or persons to whom they are and shall be so delivered giving security, if demanded, to the said drawer, to indemnify him against

all persons whatsoever, in case the said bill or bills of exchange so alleged to be lost or miscarried, shall be found again.

[3 & 4 Anne, c. 9, s. 1, made perpetual by 7th Anne, c. 25 (1709).]

An Act for giving like Remedy upon Promissory Notes as is now used upon Bills of Exchange, and for the better Payment of Inland Bills of Exchange. [1704.]

“Whereas it hath been held, that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person, and that such person to whom the sum of money mentioned in such note is payable cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note should be assigned, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note, against the person who first drew and signed the same:” therefore, the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, be it enacted by the queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same. That all notes in writing that, after the first day of May, in the year of our Lord one thousand seven hundred and five, shall be made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually intrusted by him, her, or them, to sign such promissory notes for him, her, or them, whereby such person or persons, body politic and corporate, his, her, or their servant or agent, as aforesaid, doth or shall promise to pay to any other person or persons, body politic and corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, body politic and corporate, to whom the same is made payable, and also every such note, payable to any person or persons, body politic and corporate, his, her, or their order, shall be assignable or indorsable over in the same manner as inland bills of *exchange are or [*389] may be, according to the custom of merchants; and that the person or persons, body politic and corporate, to whom such sum of money is or shall be, by such note, made payable, shall and may maintain an action for the same, in such manner as he, she, or they might do upon an inland bill of exchange, made or drawn according to the custom of merchants, against the person or persons, body politic and corporate, who, or whose servant or agent, as aforesaid, signed the same; and that any person or persons, body

politic and corporate, to whom such note that is payable to any person or persons, body politic and corporate, his, her, or their order, is indorsed or assigned, or the money therein mentioned ordered to be paid, by indorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person or persons, body politic and corporate, who, or whose servant or agent, as aforesaid, signed such note, or against any of the persons that indorse the same, in like manner as in cases of inland bills of exchange. And, in every such action, the plaintiff or plaintiffs shall recover his, her, or their damages and costs of suit; and, if such plaintiff or plaintiffs shall be non-suited, or a verdict be given against him, her, or them, the defendant or defendants shall recover his, her, or their costs against the plaintiff or plaintiffs; and every such plaintiff or plaintiffs, defendant or defendants, respectively, recovering may sue out execution for such damages and costs, by *capias*, *fiery facias*, or *elegit*.

[17 Geo. 3, c. 30, made perpetual by 27 Geo. 3, c. 16 (1787).]

An Act for further restraining the Negotiation of Promissory Notes and Inland Bills of Exchange, under a Limited Sum, within that Part of Great Britain called England. [1777.]

“Whereas by a certain act of Parliament, passed in the fifteenth year of the reign of his present Majesty, intituled, ‘*An Act to restrain the Negotiation of Promissory Notes and Inland Bills of Exchange, under a Limited Sum, within that Part of Great Britain called England*,’ all negotiable promissory or other notes, bills of exchange, or drafts, or undertakings in writing, for any sum of money less than the sum of twenty shillings in the whole, and issued after the twenty-fourth day of June, one thousand seven hundred and seventy-five, were made void, and the publishing or uttering and negotiating of any such notes, bills, drafts, or undertakings, for a less sum than twenty shillings, or on which less than that sum should be due, was, by the said act, restrained, under certain penalties or forfeitures therein mentioned; and all such notes, bills of exchange, drafts, or undertakings in writing, as have issued before the said twenty-fourth day of June, were made payable upon demand, and were directed to be recovered in such manner as is therein also mentioned; and whereas the said act hath been attended with very salutary effects, and, in case the provisions therein contained were extended to a further sum (but yet without prejudice to the convenience arising to the public from the *negotiation of promissory notes and inland bills of exchange, for the remittance of money in discharge of any [*390] balance of account, or other debt), the good purposes of the said act would be further advanced:” Be it therefore enacted by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that all promissory or other notes, bills of exchange,

or drafts, or undertakings in writing, being negotiable or transferable, for the payment of twenty shillings, or any sum of money above that sum, and less than five pounds, or on which twenty shillings or above that sum, and less than five pounds, shall remain undischarged, and which shall be issued, within that part of Great Britain called England, at any time after the first day of January, one thousand seven hundred and seventy-eight, shall specify the names and places of abode of the persons respectively to whom, or to whose order, the same shall be made payable; and shall bear date before or at the time of drawing or issuing thereof, and not on any day subsequent thereto; and shall be made payable within the space of twenty-one days next after the day of the date thereof; and shall not be transferable or negotiable after the time thereby limited for payment thereof; and that every indorsement to be made thereon shall be made before the expiration of that time, and to bear date at or not before the time of making thereof; and shall specify the name and place of abode of the person or persons to whom, or to whose order, the money contained in every such note, bill, draft, or undertaking, is to be paid; and that the signing of every such note, bill, draft, or undertaking, and also of every such indorsement, shall be attested by one subscribing witness at the least; and which said notes, bills of exchange, or drafts, or undertakings in writing, may be made or drawn in words to the purport or effect as set out in the schedule hereunto annexed, No. I. and II.; and that all promissory or other notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or transferable, for the payment of twenty shillings, or any sum of money above that sum, and less than five pounds, or in which twenty shillings, or above that sum, and less than five pounds, shall remain undischarged, and which shall be issued, within that part of Great Britain called England, at any time after the said first day of January, one thousand seven hundred and seventy-eight, in any other manner than as aforesaid; and also every indorsement on any such note, bill, draft, or undertaking, to be negotiated under this act, other than as aforesaid, shall, and the same are hereby declared to be, absolutely void; any law, statute, usage, or custom to the contrary thereof in anywise notwithstanding.

II. And be it further enacted, by the authority aforesaid, That the publishing, uttering, or negotiating, within that part of Great Britain called England, of any promissory or other note, bill of exchange, draft, or undertaking in writing, being negotiable or transferable, for twenty shillings, or above that sum, and less than five pounds, or on which twenty shillings, or above that sum, and less than five pounds, shall remain undischarged, and issued or made in any other manner than notes, bills, drafts, or undertakings, [*391] *hereby permitted to be published or negotiated as aforesaid; and also the negotiating of any such last mentioned notes, bills, drafts, or undertakings, after the time appointed for payment thereof, or before that time, in any other manner than as aforesaid, by any act, contrivance, or means whatsoever, from and after the said first day of January, one thousand seven hundred and seventy-eight, shall be, and the same is hereby declared to be,

prohibited or restrained, under the like penalties or forfeitures, and to be recovered and applied in like manner as by the said act is directed, with respect to the uttering, or publishing, or negotiating of notes, bills of exchange, drafts, or undertakings in writing, for any sum of money not less than the sum of twenty shillings, or on which less than that sum should be due.

IV. And be it further enacted, by the authority aforesaid, That the said former, and also this present act, shall continue in force, not only for the residue of the term of five years in the said former act mentioned, and from thence to the end of the then next session of Parliament, but also for the further term of five years, and from thence to the end of the then next session of Parliament.

SCHEDULE, NO. I.

[Place] [Day] [Month] [Year]

Twenty-one days after date I promise to pay to A. B., of [Place]
 , or his order, the sum of for value received by
 Witness, E. F. C. D.

And the Indorsement, toties quoties.

[Day] [Month] [Year]

Pay the contents to G. H., of [Place] or his order.
 Witness, J. K. A. B.

NO. II.

[Place] [Day] [Month] [Year]

Twenty-one days after date, pay to A. B., of [Place] or his
 order, the sum of value received, as advised by
 To E. F., of [Place]
 Witness, G. H. C. D.

And the Indorsement, toties quoties.

[Day] [Month] [Year]

Pay the contents to J. K., of [Place] or his order.
 Witness, L. M. A. B.

*[39 & 40 Geo. 3, c. 28, s. 15.]

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An Act for establishing an Agreement with the Governor and Company of the Bank of England, for advancing the sum of Three Millions, towards the Supply for the Service of the Year One Thousand Eight Hundred. [28th March, 1800.]

XV. And to prevent any doubts that may arise concerning the privilege or power given, by former acts of Parliament, to the said governor and com-

pany, of exclusive banking, and also in regard to the erecting any other bank or banks by Parliament, or restraining other persons from banking during the continuance of the said privilege granted to the Governor and Company of the Bank of England, as before recited; it is hereby further enacted and declared, That it is the true intent and meaning of this act, that no other bank shall be erected, established, or allowed by Parliament, and that it shall not be lawful for any body, politic or corporate whatsoever, erected or to be erected, or for any other persons, united or to be united in covenants or partnership, exceeding the number of six persons, in that part of Great Britain called England, to borrow, owe, or take up, any sum or sums of money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof, during the continuance of the said privilege to the said governor and company: who are hereby declared to be and remain a corporation, with the privilege of exclusive banking, as before recited, subject to redemption on the terms and conditions before mentioned; that is to say, on one year's notice, to be given after the first day of August one thousand eight hundred and thirty-three, and repayment of the said sum of three millions two hundred thousand pounds, and all arrears of the said one hundred thousand pounds, per annum; and also upon repayment of the said sum of eight millions four hundred and eighty-six thousand and eight hundred pounds, and the interest or annuities payable thereon or in respect thereof, and all the principal and interest money that shall be owing on all such tallies, Exchequer orders, Exchequer bills, parliamentary funds, or other government securities, which the said governor and company, or their successors, shall have remaining in their hands, or be entitled to, at the time of such notice to be given as aforesaid, and not otherwise; anything in this act or any former act or acts of Parliament, to the contrary in anywise notwithstanding.

[48 Geo. 3, c. 88.]

An Act to restrain the Negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum, in England. [23d June, 1808.]

"Whereas various notes, bills of exchange, and drafts for money for very small sums, have, for some time past, been circulated or negotiated in lieu of cash, within that part of Great Britain called England, to the great prejudice of trade and public credit, and many of such bills and drafts being payable under certain terms and restrictions, which the poorer sort of manufacturers, artificers, *laborers, and others, cannot comply with otherwise than by being subject to great extortion and abuse; and whereas an act, passed in the fifteenth year of the reign of his present Majesty, intituled, '*An Act to restrain the Negotiation of Promissory Notes and Inland Bills of Exchange under a Limited Sum, within that part of Great Britain called England*,' for preventing the circulating such notes and drafts; and, whereas, doubts have arisen as to the power of justices of the peace to

hear and determine offences under the said act, and it is therefore expedient that more effectual provisions should be made for enforcing the provisions of the said act ;" be it therefore enacted, by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act, the said recited act shall be, and the same is hereby repealed.

II. And be it further enacted, that all promissory or other notes, bills of exchange or drafts, or undertakings in writing, being negotiable or transferable, for the payment of any sum or sums of money, or any orders, notes, or undertakings in writing, being negotiable or transferable, for the delivery of any goods, specifying their value in money, less than the sum of twenty shillings in the whole, heretofore made or issued, or which shall hereafter be made or issued, shall, from and after the first day of October, one thousand eight hundred and eight, be and the same are hereby declared to be, absolutely void and of no effect ; any law, statute, usage, or custom, to the contrary thereof in anywise notwithstanding.

III. And be it further enacted, that if any person or persons shall, after the first day of July, one thousand eight hundred and eight, by any art, device, or means whatsoever, publish or utter any such notes, bills, drafts, or engagements as aforesaid, for a less sum than twenty shillings, or on which less than the sum of twenty shillings shall be due, and which shall be in anywise negotiable or transferable, or shall negotiate or transfer the same, every such person shall forfeit and pay, for every such offence, any sum not exceeding twenty pounds, nor less than five pounds, at the discretion of the justice of the peace who shall hear and determine such offence.

IV. And be it further enacted, that it shall be lawful for any justice or justices of the peace, acting for the county, riding, city, or place within which any offence against this act shall be committed, to hear and determine the same in a summary way, at any time within twenty days after such offence shall have been committed ; and such justice or justices, upon any information exhibited, or complaint made upon oath in that behalf, shall summon the party accused, and also the witnesses on either side, and shall examine into the matter of fact, and upon due proof made thereof, either by the voluntary confession of the party, or by the oath of one or more credible witness or witnesses, or otherwise (which oath such justice or justices is or are hereby authorized to administer), shall convict the offender and adjudge the penalty of such offence.

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*[55 Geo. 3, c. 184.]

An Act for repealing the Stamp Duties on Deeds, Law Proceedings, and other written or printed Instruments, and the Duties on Fire Insurances, and on Legacies and Successions to Personal Estate upon Intestacies, now payable in Great Britain, and for granting other Duties in lieu thereof.
[11th July, 1815.]

[PRESENT GENERAL STAMP ACT.]

X. And be it further enacted, That from and after the passing of this act all instruments for or upon which any stamp or stamps shall have been used of any improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall, nevertheless, be deemed valid and effectual in the law, except in cases where the stamp or stamps used on such instruments shall have been specially appropriated to any other instrument, by having its name on the face thereof.

XI. And be it further enacted, That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, or shall accept or pay, or cause or permit to be accepted or paid, any bill of exchange, draft, or order, or promissory note, for the payment of money, liable to any of the duties imposed by this act, without the same being duly stamped for denoting the duty hereby charged thereon, he, she, or they shall, for every such bill, draft, order, or note, forfeit the sum of fifty pounds.

XII. And be it further enacted, that if any person or persons shall make and issue, or cause to be made and issued, any bill of exchange, draft, or order, or promissory note for the payment of money, at any time after date or sight, which shall bear date subsequent to the day on which it shall be issued, so that it shall not, in fact, become payable in two months, if made payable after date, or in sixty days, if made payable after sight, next after the day on which it shall be issued, unless the same shall be stamped for denoting the duty hereby imposed on a bill of exchange and promissory note, for the payment of money, at any time exceeding two months after date, or sixty days after sight, he, she, or they shall, for every such bill, draft, order, or note, forfeit the sum of one hundred pounds.

XIII. And, for the more effectually preventing of frauds and evasions of the duties hereby granted on bills of exchange, drafts, or orders, for the payment of money, under color of the exemption in favor of drafts or orders upon bankers, or persons acting as bankers, contained in the schedule hereunto annexed, be it further enacted, That, if any person or persons shall, after the thirty-first day of August, one thousand eight hundred and fifteen, make and issue, or cause to be made and issued, any bill, draft, or order, for the payment of money to the bearer on demand, upon any banker or

bankers, or any person or persons acting as a banker or bankers, which shall be dated on any day subsequent to the *day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not, in every respect, fall within the said exemption, unless the same shall be duly stamped as a bill of exchange, according to this act, the person or persons so offending shall, for every such bill, draft, or order, forfeit the sum of one hundred pounds; and, if any person or persons shall knowingly receive or take any such bill, draft, or order, in payment of, or as security for, the sum therein mentioned, he, she, or they shall, for every such bill, draft, or order, forfeit the sum of twenty pounds; and, if any banker or bankers, or any person or persons acting as a banker, upon whom any such bill, draft, or order, shall be drawn, shall pay, or cause or permit to be paid, the sum of money therein expressed, or any part thereof, knowing the same to be post-dated, or knowing that the place where it was issued is not truly specified and set forth therein, or knowing that the same does not, in any other respect, fall within the said exemption, then the banker or bankers, or person or persons so offending, shall, for every such bill, draft, or order, forfeit the sum of one hundred pounds, and, moreover, shall not be allowed the money so paid, or any part thereof, in account against the person or persons by or for whom such bill, draft, or order, shall be drawn, or his, her, or their executors or administrators, or his, her, or their assignees or creditors, in case of bankruptcy or insolvency, or any other person or persons claiming under him, her, or them.

XIV. And be it further enacted, that from and after the thirty-first day of August, one thousand eight hundred and fifteen, it shall be lawful for any banker or bankers, or other person or persons, who shall have made and issued any promissory notes for the payment to the bearer on demand of any sum of money not exceeding one hundred pounds each, duly stamped according to the directions of this act, to reissue the same from time to time, after payment thereof, as often as he, she, or they shall think fit, without being liable to pay any farther duty in respect thereof, and that all promissory notes, so to be reissued as aforesaid, shall be good, and valid, and as available in the law to all intents and purposes, as they were upon the first issuing thereof.

XV. And be it further enacted, that no promissory note for the payment to the bearer on demand of any sum of money not exceeding one hundred pounds, which shall have been made and issued by any bankers or other persons in partnership, and for which the proper stamp duty shall have been once paid, according to the provisions of this act, shall be deemed liable to the payment of any further duty, although the same shall be reissued by and as the note of some only of the persons who originally made and issued the same, or by and as the note of any one or more of the persons who originally made and issued the same, and any other person or persons in partnership with him or them jointly; nor although such note, if made payable

at any other than the place where drawn, shall be reissued with any alteration therein, only of the house or place at which the same shall have been at first made payable.

[*396] *XVI. And be it further enacted, that all promissory notes for the payment to the bearer on demand of any sum of money, which shall have been actually and bona fide issued, and in circulation before or upon the said thirty-first day of August, one thousand eight hundred and fifteen, duly stamped, according to the aforesaid act of the forty-eighth year of his Majesty's reign, and which shall then be reissuable, within the intent and meaning of that act, or of an act passed in the fifty-third year of his Majesty's reign, for altering, explaining, and amending the said former act, with regard to the duties on reissuable promissory notes, shall continue to be reissuable until the expiration of three years from the date thereof, respectively, but not afterwards, without payment of any further duty for the same; and if any banker or bankers, or other person or persons, shall, at any time after the said thirty-first day of August, issue or cause to be issued, for the first time, any promissory note for the payment of money to the bearer on demand, bearing date before or upon that day, he, she, or they shall, for every such promissory note, forfeit the sum of fifty pounds.

XVII. Provided always, and in regard that certain bankers in Scotland have issued promissory notes for the payment to the bearer on demand, of a sum not exceeding two pounds and two shillings each, with the dates thereof printed therein, and many such notes have been but recently issued for the first time, although they may appear by the date to be of more than three years' standing, be it further enacted, That all such promissory notes as last mentioned, which shall have been actually and bona fide issued, and in circulation, before or upon the said thirty-first day of August, one thousand eight hundred and fifteen, duly stamped, according to the said act of the forty-eighth year of his Majesty's reign, and which shall bear a printed date prior to the thirty-first day of August, one thousand eight hundred and thirteen, shall continue to be reissuable until the thirty-first day of August, one thousand eight hundred and sixteen, but not afterwards, without payment of any further duty for the same; and if any banker or bankers, or other person or persons, shall, at any time after the said thirty-first day of August, one thousand eight hundred and fifteen, issue or cause to be issued, for the first time, any such promissory note, bearing a printed date prior to the said thirty-first day of August, one thousand eight hundred and thirteen, he or they shall, for every promissory note so issued, forfeit the sum of fifty pounds.

XVIII. And be it further enacted, that from and after the thirty-first day of August, one thousand eight hundred and fifteen, it shall not be lawful for any banker or bankers, or other person or persons, to issue any promissory note for the payment of money to the bearer on demand, liable to

any of the duties imposed by this act, with the date printed therein; and, if any banker or bankers, or other person or persons, shall issue, or cause to be issued, any such promissory note, with the date printed therein, he or they shall, for every promissory note so issued, forfeit the sum of fifty pounds.

XIX. *And be it further enacted, That all promissory notes hereby allowed to continue reissuable for a limited period, but not afterwards, shall, upon the payment thereof, at any time after the expiration of such period, and all promissory notes, bills of exchange, drafts, or orders for money, not hereby allowed to be reissued, shall, upon any payment thereof, be deemed and taken respectively to be thereupon wholly discharged, vacated, and satisfied, and shall be no longer negotiable or available in any manner whatsoever, but shall be forthwith cancelled by the person or persons paying the same; and, if any person or persons shall re-issue, or cause or permit to be reissued, any promissory note hereby allowed to be reissued for a limited period, as aforesaid, at any time after the expiration of the term or period allowed for that purpose; or if any person or persons shall reissue, or cause or permit to be reissued, any promissory note, bill of exchange, draft, or order for money, not hereby allowed to be reissued at any time after the payment thereof; or if any person or persons paying, or causing to be paid, any such note, bill, draft, or order, as aforesaid, shall refuse or neglect to cancel the same, according to the directions of this act, then, and in either of those cases, the person or persons so offending shall, for every such note, bill, draft, or order, as aforesaid, forfeit the sum of fifty pounds; and, in case of any such note, bill, draft, or order, being reissued, contrary to the intent and meaning of this act, the person or persons re-issuing the same, or causing or permitting the same to be reissued, shall also be answerable and accountable to his Majesty, his heirs and successors, for a further duty in respect of every such note, bill, draft, or order, of such and the same amount as would have been chargeable thereon, in case the same had been then issued for the first time, and so from time to time as often as the same shall be so reissued, which further duty shall and may be sued for and recovered accordingly, as a debt to his Majesty, his heirs and successors; and, if any person or persons shall receive or take any such note, bill, draft, or order, in payment of, or as a security for, the sum therein expressed, knowing the same to be reissued contrary to the intent and meaning of this act, he, she, or they shall, for every such note, bill, draft, or order, forfeit the sum of twenty pounds.

XX. And be it further enacted, That all promissory notes and bank post-bills which shall be issued by the governor and company of the Bank of England, from and after the said thirty-first day of August, one thousand eight hundred and fifteen, shall be freed and exempted from all the duties hereby granted, and that it shall be lawful for the said governor and com-

pany to reissue any of their notes, after payment thereof, as often as they shall think fit.

XXI. And be it further enacted, That the composition payable by the said governor and company of the Bank of England for the stamp duties on their promissory notes and bank post-bills, under the aforesaid act of the forty-eighth year of his Majesty's reign, shall cease from the fifth day of April last; and that the said governor and company shall deliver to [*398] the said commissioners *of stamps, within one calendar month after the passing of this act, and afterwards on the first day of May in every year whilst the present stamp duties shall remain in force, a just and true account, verified by the oath of their chief accountant, of the amount or value of all their promissory notes and bank post-bills in circulation, on some given day in every week, for the space of three years preceding the sixth day of April, in the year in which the account shall be delivered, together with the average amount of value thereof, according to such account; and that the said governor and company shall pay into the hands of the receiver-general of the stamp duties in Great Britain, as a composition for the duties which would otherwise have been payable for their promissory notes and bank post-bills, issued within the year, reckoning from the fifth day of April, preceding the delivery of the said account, the sum of three thousand five hundred pounds for every million, and after that rate for half a million, but not for a less sum than half a million, of the said average amount or value of their said notes and bank post-bills in circulation; and that one half-part of the sum so to be ascertained as aforesaid for each year's composition, shall be paid on the first day of October, and the other half on the first day of April, next after the delivery of such account as aforesaid.

XXII. Provided always, and be it further enacted, That upon the said governor and company resuming their payments in cash, a new arrangement for the composition for the stamp duties, payable on their promissory notes and bank post-bills, shall be submitted to Parliament.

XXIII. And be it further enacted, That from and after the thirty-first day of August, one thousand eight hundred and fifteen, it shall be lawful for the governor and company of the Bank of Scotland, and the Royal Bank of Scotland, and the British Linen Company in Scotland, respectively, to issue their promissory notes for the sums of one pound, one guinea, two pounds, and two guineas, payable to the bearer on demand, on unstamped paper, in the same manner as they were authorized to do by the aforesaid act of the forty-eighth year of his Majesty's reign; they, the said governor and company of the Bank of Scotland, and the Royal Bank of Scotland, and British Linen Company, respectively, giving such security, and keeping and producing true accounts of all the notes so to be issued by them respectively, and accounting for and paying the several duties payable in respect of such notes, in such and the same manner, in all respects, as is and are prescribed

and required by the said last-mentioned act, with regard to the notes thereby allowed to be issued by them on unstamped paper, and also to reissue such promissory notes respectively, from time to time, after the payment thereof, as often as they shall think fit.

XXIV. And be it further enacted, that from and after the tenth day of October, one thousand eight hundred and fifteen, it shall not be lawful for any banker or bankers, or other person or persons (except the governor and company of the Bank of England), to issue any promissory notes [*399] for money payable to the *bearer on demand, hereby charged with a duty and allowed to be reissued as aforesaid, without taking out a license yearly for that purpose; which license shall be granted by two or more of the said commissioners of stamps for the time being, or by some person authorized in that behalf by the said commissioners or the major part of them, on payment of the duty charged thereon in the schedule hereunto annexed; and a separate and distinct license shall be taken out, for or in respect of every town or place where any such promissory notes shall be issued by, or by any agent or agents for or on account of, any banker or bankers, or other person or persons; and every such license shall specify the proper name or names, and place or places of abode, of the person or persons, or the proper name and description of any body corporate, to whom the same shall be granted, and also the name of the town or place where, and the name of the bank, as well as the partnership, or other name, style, or firm, under which such notes are to be issued; and where any such license shall be granted to persons in partnership, the same shall specify and set forth the names and places of abode of all the persons concerned in the partnership, whether all their names shall appear on the promissory notes to be issued by them or not; and, in default thereof, such license shall be absolutely void; and every such license which shall be granted between the tenth day of October and the eleventh day of November, in any year, shall be dated on the eleventh day of October; and every such license which shall be granted at any other time, shall be dated on the day on which the same shall be granted; and every such license respectively shall have effect and continue in force from the day and date thereof until the tenth day of October following, both inclusive.

XXV. Provided always, and be it further enacted, That no banker or bankers, person or persons, shall be obliged to take out more than four licenses in all for any number of towns or places in Scotland; and in case any banker or bankers, person or persons, shall issue such promissory notes as aforesaid, by themselves or their agents, at more than four different towns or places in Scotland, then, after taking out three distinct licenses for three of such towns or places, such banker or bankers, person or persons, shall be entitled to have all the rest of such towns or places included in a fourth license.

XXVI. Provided also, and be it further enacted, That where any banker or bankers, person or persons, applying for a license under this act, would, under the said act of the forty-eighth^(a) year of his Majesty's reign, have been entitled to have two or more towns or places in England included in one license, if this act had not been made, such banker or bankers, person or persons, shall have and be entitled to the like privilege under this act.

XXVII. And be it further enacted, That the banker or bankers, or other
[*400] person or persons, applying for any such license as aforesaid, shall produce and leave with the proper officer a specimen of *the promissory notes proposed to be issued by him or them, to the intent that the license may be framed accordingly; and, if any banker or bankers, or other person or persons (except the said governor and company of the Bank of England) shall issue or cause to be issued, by any agent, any promissory note for money payable to the bearer on demand, hereby charged with a duty, and allowed to be reissued as aforesaid, without being licensed so to do in the manner aforesaid, or at any other town or place, or under any other name, style, or firm, than shall be specified in his or their license, the banker or bankers, or other person or persons, so offending, shall for every such offence, forfeit the sum of one hundred pounds.

XXVIII. And be it further enacted, That where any such license, as aforesaid, shall be granted to any persons in partnership, the same shall continue in force for the issuing of promissory notes duly stamped, under the name, style, or firm therein specified, until the tenth day of October inclusive, following the date thereof, notwithstanding any alteration in the partnership.

XXIX. And be it further enacted, That from and after the passing of this act, promissory notes for the payment of money to the bearer on demand, made out of Great Britain, or purporting to be made out of Great Britain, or purporting to be made by or on the behalf of any person or persons resident out of Great Britain, shall not be negotiable or be negotiated, or circulated or paid in Great Britain, whether the same shall be made payable in Great Britain or not, unless the same shall have paid such duty, and be stamped in such manner, as the law requires for promissory notes of the like tenor and value, made in Great Britain; and, if any person or persons shall circulate or negotiate, or offer in payment, or shall receive or take in payment, any such promissory note, or shall demand or receive payment of the whole or any part of the money mentioned in such promissory note, from or on account of the drawer thereof, in Great Britain, the same not being duly stamped, as aforesaid; or if any person or persons in Great Britain shall pay, or cause to be paid, the sum of money expressed in any such note, not being duly stamped as aforesaid, or any part thereof, either as drawer thereof, or in pursuance of any nomination or appointment for that purpose therein contained,

the person or persons so offending shall, for every such promissory note, forfeit the sum of twenty pounds: provided always, that this clause shall not extend to promissory notes made and payable only in Ireland.

*SCHEDULE.

[*401]

INLAND BILLS OF EXCHANGE, draft or order to the bearer, or to order either on demand or otherwise, not exceeding two months after date, or sixty days after sight, of any sum of money—

	£	s.	d.
Amounting to 40s. and not exceeding 5 <i>l.</i> 5s.,	0	1	0
Exceeding 5 <i>l.</i> 5s., not exceeding 20 <i>l.</i> ,	0	1	6
Exceeding 20 <i>l.</i> , not exceeding 30 <i>l.</i> ,	0	2	0
Exceeding 30 <i>l.</i> , not exceeding 50 <i>l.</i> ,	0	2	6
Exceeding 50 <i>l.</i> , not exceeding 100 <i>l.</i> ,	0	3	6
Exceeding 100 <i>l.</i> , not exceeding 200 <i>l.</i> ,	0	4	6
Exceeding 200 <i>l.</i> , not exceeding 300 <i>l.</i> ,	0	5	0
Exceeding 300 <i>l.</i> , not exceeding 500 <i>l.</i> ,	0	6	0
Exceeding 500 <i>l.</i> , not exceeding 1000 <i>l.</i> ,	0	8	6
Exceeding 1000 <i>l.</i> , not exceeding 2000 <i>l.</i> ,	0	12	6
Exceeding 2000 <i>l.</i> , not exceeding 3000 <i>l.</i> ,	0	15	0
Exceeding 3000 <i>l.</i> ,	1	5	0

Inland bill of exchange, draft, or order for the payment to the bearer, or to order at any time exceeding two months after date, or sixty days after sight, of any sum of money.

Amounting to 40s., and not exceeding 5 <i>l.</i> 5s.,	0	1	6
Exceeding 5 <i>l.</i> 5s., not exceeding 20 <i>l.</i> ,	0	2	0
Exceeding 20 <i>l.</i> , not exceeding 30 <i>l.</i> ,	0	2	6
Exceeding 30 <i>l.</i> , not exceeding 50 <i>l.</i> ,	0	3	6
Exceeding 50 <i>l.</i> , not exceeding 100 <i>l.</i> ,	0	4	6
Exceeding 100 <i>l.</i> , not exceeding 200 <i>l.</i> ,	0	5	0
Exceeding 200 <i>l.</i> , not exceeding 300 <i>l.</i> ,	0	6	0
Exceeding 300 <i>l.</i> , not exceeding 500 <i>l.</i> ,	0	8	6
Exceeding 500 <i>l.</i> , not exceeding 1000 <i>l.</i> ,	0	12	6
Exceeding 1000 <i>l.</i> , not exceeding 2000 <i>l.</i> ,	0	15	0
Exceeding 2000 <i>l.</i> , not exceeding 3000 <i>l.</i> ,	1	5	0
Exceeding 3000 <i>l.</i> ,	1	10	0

Inland bill, draft, or order, for the payment of any sum of money, though not made payable to the bearer, or to order, if the same shall be delivered to the payee, or some person on his or her behalf—the same duty as on a bill of exchange for the like sum payable to bearer or order.

Inland bill, draft, or order for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made pay-

able to the bearer, or to order, or if delivered to the payee, or some person on his or her behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom—the same duty as on a bill payable to bearer or order on demand, for a sum equal to such total amount.

And, where the total amount of the money thereby made payable shall be indefinite—the same duty as on a bill on demand, for the sum therein expressed only.

[*402] *And the following instruments shall be deemed and taken to be inland bills, drafts, or orders, for the payment of money, within the intent and meaning of this schedule, viz. : All drafts or orders for the payment of any sum of money, by a bill or promissory note, or for the delivery of any such bill or note, in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer, or to order, or shall be delivered to the payee, or to some person on his or her behalf.

All receipts given by any banker or bankers, or other person or persons, for money received, which shall entitle, or be intended to entitle the person or persons paying the money or the bearer of such receipt, to receive the like sum from any third person or persons.

And all bills, drafts, or orders, for the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee, or some person on his or her behalf.

FOREIGN BILL OF EXCHANGE (or bill of exchange drawn in, but payable out of Great Britain), if drawn singly, and not in a set—the same duty as on an inland bill of the same amount and tenor.

Foreign bills of exchange, drawn in sets, according to the custom of merchants, for every bill of each set, where the sum made payable thereby shall not exceed 100 <i>l.</i> ,	£	s.	d.
And where it shall exceed 100 <i>l.</i> , and not exceed 200 <i>l.</i> ,	0	1	6
Where it shall exceed 200 <i>l.</i> , and not exceed 500 <i>l.</i> ,	0	3	0
Where it shall exceed 500 <i>l.</i> , and not exceed 1000 <i>l.</i> ,	0	4	0
Where it shall exceed 1000 <i>l.</i> , and not exceed 2000 <i>l.</i> ,	0	5	0
Where it shall exceed 2000 <i>l.</i> , and not exceed 3000 <i>l.</i> ,	0	7	6
Where it shall exceed 3000 <i>l.</i> ,	0	10	0
Where it shall exceed 3000 <i>l.</i> ,	0	15	0

Exemptions from the preceding and all other Stamp Duties.

All bills of exchange, or bank post-bills, issued by the governor and company of the Bank of England.

All bills, orders, remittance bills, and remittance certificates, drawn by commissioned officers, masters, and surgeons in the navy, or by any commissioner or commissioners of the navy, under the authority of the act passed in the thirty-fifth year of his Majesty's reign, for the more expeditious payment of the wages and pay of certain officers of the navy.

All bills drawn pursuant to any former act or acts of Parliament by the commissioners of the navy, or by the commissioners for victualling the navy, or by the commissioners for managing the transport service, and *for taking care of sick and wounded seamen, upon, and payable by the treasurer [*403] of the Navy.

All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside, or transact the business of a banker, within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes.

All bills for the pay and allowances of his Majesty's land forces, or for other expenditures liable to be charged in the public regimental or district accounts, which shall be drawn according to the forms now prescribed, or hereafter to be prescribed, by his Majesty's orders, by the paymasters of regiments or corps, or by the chief paymaster, or deputy paymaster, and accountant of the army depot, or by the paymasters of recruiting districts, or by the paymasters of detachments, or by the officer or officers authorized to perform the duties of the paymastership during a vacancy, or the absence, suspension, or incapacity of any such paymaster, as aforesaid; save and except such bills as shall be drawn in favor of contractors, or others, who furnish bread or forage to his Majesty's troops, and who, by their contracts or agreements, shall be liable to pay the stamp duties on the bills given in payment for the articles supplied by them.

PROMISSORY NOTE, for the payment, to the bearer on demand, of any sum of money—

	£	s.	d.
Not exceeding 1 <i>l.</i> 1 <i>s.</i> ,	0	0	5
Exceeding 1 <i>l.</i> 1 <i>s.</i> , and not exceeding 2 <i>l.</i> 2 <i>s.</i> ,	0	0	10
Exceeding 2 <i>l.</i> 2 <i>s.</i> , and not exceeding 5 <i>l.</i> 5 <i>s.</i> ,	0	1	3
Exceeding 5 <i>l.</i> 5 <i>s.</i> , and not exceeding 10 <i>l.</i> ,	0	1	9
Exceeding 10 <i>l.</i> , and not exceeding 20 <i>l.</i> ,	0	2	0
Exceeding 20 <i>l.</i> , and not exceeding 30 <i>l.</i> ,	0	3	0

	£	s.	d.
Exceeding 30 <i>l.</i> , and not exceeding 50 <i>l.</i> ,	0	5	0
Exceeding 50 <i>l.</i> , and not exceeding 100 <i>l.</i> ,	0	8	6
Which said notes may be reissued, after payment thereof, as often as shall be thought fit.			
Promissory note for the payment, in any other manner than to the bearer on demand, but not exceeding two months after date or sixty days after sight, of any sum of money—			
Amounting to 40 <i>s.</i> , and not exceeding 5 <i>l.</i> 5 <i>s.</i> ,	0	1	0
Exceeding 5 <i>l.</i> 5 <i>s.</i> , and not exceeding 20 <i>l.</i> ,	0	1	6
Exceeding 20 <i>l.</i> , and not exceeding 30 <i>l.</i> ,	0	2	0
Exceeding 30 <i>l.</i> , and not exceeding 50 <i>l.</i> ,	0	2	6
Exceeding 50 <i>l.</i> , and not exceeding 100 <i>l.</i> ,	0	3	6
[*404] *These notes are not to be reissued after being once paid.			

Promissory note for the payment, either to the bearer on demand, or in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money—			
Exceeding 100 <i>l.</i> , and not exceeding 200 <i>l.</i> ,	0	4	6
Exceeding 200 <i>l.</i> , and not exceeding 300 <i>l.</i> ,	0	5	0
Exceeding 300 <i>l.</i> , and not exceeding 500 <i>l.</i> ,	0	6	0
Exceeding 500 <i>l.</i> , and not exceeding 1000 <i>l.</i> ,	0	8	6
Exceeding 1000 <i>l.</i> , and not exceeding 2000 <i>l.</i> ,	0	12	6
Exceeding 2000 <i>l.</i> , and not exceeding 3000 <i>l.</i> ,	0	15	0
Exceeding 3000 <i>l.</i> ,	1	5	0

These notes are not to be reissued after being once paid.

Promissory note for the payment, to the bearer or otherwise, at any time exceeding two months after date, or sixty days after sight, of any sum of money—			
Amounting to 40 <i>s.</i> , and not exceeding 5 <i>l.</i> 5 <i>s.</i> ,	0	1	6
Exceeding 5 <i>l.</i> 5 <i>s.</i> , and not exceeding 20 <i>l.</i> ,	0	2	0
Exceeding 20 <i>l.</i> , and not exceeding 30 <i>l.</i> ,	0	2	6
Exceeding 30 <i>l.</i> , and not exceeding 50 <i>l.</i> ,	0	3	6
Exceeding 50 <i>l.</i> , and not exceeding 100 <i>l.</i> ,	0	4	6
Exceeding 100 <i>l.</i> , and not exceeding 200 <i>l.</i> ,	0	5	0
Exceeding 200 <i>l.</i> , and not exceeding 300 <i>l.</i> ,	0	6	0
Exceeding 300 <i>l.</i> , and not exceeding 500 <i>l.</i> ,	0	8	6
Exceeding 500 <i>l.</i> , and not exceeding 1000 <i>l.</i> ,	0	12	6
Exceeding 1000 <i>l.</i> , and not exceeding 2000 <i>l.</i> ,	0	15	0
Exceeding 2000 <i>l.</i> , and not exceeding 3000 <i>l.</i> ,	1	5	0
Exceeding 3000 <i>l.</i> ,	1	10	0

These notes are not to be reissued, after being once paid.

Promissory note for the payment of any sum of money by instalments, or for the payment of several sums of money at different

days or times, so that the whole of the money to be paid shall be definite and certain—The same duty as on a promissory note, payable in less than two months after date for a sum equal to the whole amount of money to be paid.

And the following instruments shall be deemed and taken to be promissory notes, within the intent and meaning of this schedule, viz. :—

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the bearer or to order, and if the same shall be definite and certain, and not amount in the whole to twenty pounds.

*And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall con- [*405]tain any agreement or memorandum, importing that interest shall be paid for the money so deposited.

Exemptions from the Duties on Promissory Notes.

All notes, promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; where the same shall not be made payable to the bearer or to order, and also where the same shall be made payable to the bearer or to order, if the same shall amount to twenty pounds, or be indefinite.

And all other instruments, bearing in any degree the form or style of promissory notes, but which in law should be deemed special agreements, except those hereby expressly directed to be deemed promissory notes.

But such of the notes and instruments here exempted from the duty on promissory notes, shall nevertheless be liable to the duty which may attach thereon, as agreements or otherwise.

Exemptions from the preceding and all other Stamp Duties.

All promissory notes for the payment of money issued by the governor and company of the Bank of England.

PROTEST of any bill of exchange or promissory note, for any sum of money—

	£	s.	d.
Not amounting to 20 <i>l.</i> ,	0	2	0
Amounting to 20 <i>l.</i> , and not amounting to 100 <i>l.</i> ,	0	3	0
Amounting to 100 <i>l.</i> , and not amounting to 500 <i>l.</i> ,	0	5	0
Amounting to 500 <i>l.</i> , or upwards,	0	10	0
Protest of any other kind,	0	5	0

And for every sheet or piece of paper, parchment, or vellum,
upon which the same shall be written, after the first, a fur- £ s. d.
ther progressive duty of 0 5 0

[58 Geo. 3, c. 93.]

An Act to afford relief to the bona fide Holders of Negotiable Securities, without Notice that they are given for a usurious Consideration. [10th June, 1818.]

“Whereas, by the laws now in force, all contracts and assurances whatsoever, for payment of money, made for a usurious consideration, are utterly void; and whereas, in the course of mercantile *transactions, negotiable securities often pass into the hands of persons who have discounted the same without any knowledge of the original consideration for which the same were given; and the avoidance of such securities in the hands of such bona fide indorsees, without notice, is attended with great hardship and injustice;” for remedy thereof, be it enacted, by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That no bill of exchange or promissory note, that shall be drawn or made after the passing of this act, shall, though it may have been given for a usurious consideration, or upon a usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration, or upon a usurious contract.

[1 & 2 Geo. 4, c. 78.]

An Act to regulate Acceptances of Bills of Exchange.

[2d July, 1821.]

Whereas, according to law, as hath been adjudged, where a bill is accepted payable at a banker’s, the acceptance thereof is not a general but a qualified acceptance; and whereas, a practice hath very generally prevailed among merchants and traders so to accept bills, and the same have, among such persons, been very generally considered as bills generally accepted, and accepted without qualification: and whereas many persons have been and may be much prejudiced and misled by such practice and understanding, and persons accepting bills may relieve themselves from all inconvenience, by giving such notice as hereinafter mentioned of their intention to make only a qualified acceptance thereof: be it therefore enacted by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by

the authority of the same, That from and after the first day of August now next ensuing, if any person shall accept a bill of exchange, payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but, if the acceptor shall, in his acceptance, express that he accepts the bill, payable at the banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment when such payment shall have been first duly demanded at such banker's house or other place.

II. And be it further enacted, That from and after the said first day of August, no acceptance of any inland bill of exchange shall be *sufficient to charge any person, unless such acceptance be in writing on [*407] such bill, or if there be more than one part of such bill, on one of the said parts.

[6 Geo. 4, c. 16.]

An Act to Amend the laws relating to Bankrupts.

[2d May, 1825.]

XV. And be it enacted, That no such commission shall be issued, unless the single debt(a) of such creditor, or two or more persons being partners, petitioning for the same, shall amount to one hundred pounds or upwards, or unless the debt of two creditors so petitioning shall amount to one hundred and fifty pounds or upwards, or unless the debt of three or more creditors so petitioning shall amount to two hundred pounds or upwards; and that every person who has given credit to any trader upon valuable consideration, for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may so petition or join in such petitioning as aforesaid, whether he shall have any security in writing or otherwise for such sum or not.

LII. And be it enacted, That any person who, at the issuing the commission, shall be surety or liable for any debt of the bankrupt, or bail of the bankrupt, either to the sheriff or to the action, if he shall have paid the debt or any part thereof in discharge of the whole debt (although he may have paid the same after the commission issued), if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission, which said creditor possessed or would be entitled to in respect of such proof; or if the creditor shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment, as a debt under the commission, not disturbing

(a) 5 & 6 Vict. c. 122, s. 9.

the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail as aforesaid, after an act of bankruptcy committed by such bankrupt: provided that such person had not, when he became such surety or bail, or so liable, as aforesaid, notice of any act of bankruptcy by such bankrupt committed.

LVII. And be it enacted, That in all future commissions against any person or persons liable upon any bill of exchange or promissory note, whereupon interest is not reserved, overdue at the issuing the commission, the holder of such bill of exchange or promissory note shall be entitled to prove for interest upon the same, to be calculated by the commissioners to the date of the commission, at such rate as is allowed by the Court of King's Bench in actions upon such bills or notes.

[*408] *LXXII. And be it enacted, That if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of his creditors under the commission; provided, that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an Act of Parliament made in the fourth year of his present Majesty, intituled, "*An Act for the Registering of Vessels.*"

LXXIII. And be it enacted, That if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration), have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, offices, fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the commissioners shall have power to sell and dispose of the same, as aforesaid; and every such sale shall be valid against the bankrupt, and such children and persons as aforesaid, and against all persons claiming under him.

CXXV. And be it enacted, That any contract or security made or given by any bankrupt or other person, unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration, or with intent to persuade such creditor to consent to or sign such certificate, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable; and the party sued on such contract or security may plead the general issue, and give this act and the special matter in evidence.

[7 Geo. 4, c. 6.]

An Act to limit, and after a certain period to prohibit the Issuing of Promissory Notes, under a limited Sum in England. [27th March, 1826.]

“Whereas it is expedient to limit, and after the expiration of a certain period to prohibit the issuing, or reissuing, and circulation by bankers, banking companies, or other persons, of promissory notes, drafts, or undertakings in writing, under a limited sum, payable on demand to the bearer thereof, in that part of the United Kingdom called England;” Be it therefore enacted by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this *present Parliament assembled, and by the authority of the same, That from and [*409] after the passing of this act, an act passed in the third year of the reign of his present Majesty, intituled “*An Act to continue, until the Fifth Day of January, One Thousand Eight Hundred and Thirty-three, an Act of the Thirty-seventh Year of his late Majesty, for suspending the Operation of an Act of the Seventeenth Year of his late Majesty, for restraining the Negotiation of Promissory Notes and Bills of Exchange under a limited sum in England,*” shall be and the same is hereby repealed.

II. Provided always, and be it enacted, That the said act passed in the seventeenth year of his late Majesty, intituled, “*An Act for further restraining the Negotiation of Promissory Notes and Inland Bills of Exchange, under a limited Sum, within that part of Great Britain called England*” (which act was made perpetual by an act passed in the twenty-seventh year of the reign of his late Majesty, intituled, “*An Act for making perpetual Two Acts passed in the Fifteenth and Seventeenth Years of the reign of his present Majesty, for restraining the Negotiation of Promissory Notes and Bills of Exchange, under a limited Sum, within that part of Great Britain called England,*” and will, by the repeal of the said recited act of the third year of the reign of his present Majesty, become and be in full force), shall not extend, or be construed to extend, to any such promissory notes, or forms of promissory notes payable to bearer on demand, of any bankers or banking companies, or other person or persons in England, duly licensed, as shall have been stamped before the fifth day of February, one thousand eight hundred and twenty-six, under the provisions of any act or acts relating to the stamp duties upon promissory notes or bills of exchange under the sum of five pounds; nor to any promissory notes of the governor and company of the Bank of England, payable to the bearer on demand, for any sum under five pounds, which shall have been made out and bear date before the tenth day of October, one thousand eight hundred and twenty-six; but all such promissory notes so duly stamped, or so made out and bearing date as aforesaid, may be issued and reissued by all such bankers and banking companies, and persons aforesaid, and by the governor and company of the Bank of England respectively, until the fifth day of April, one thousand eight hundred and

twenty-nine; anything in any act or acts of Parliament to the contrary notwithstanding.

III. And be it further enacted, That if any body politic or corporate, or any person or persons, shall, from and after the passing of this act and before the fifth day of April, one thousand eight hundred and twenty-nine, make, sign, issue, or reissue, in England, any promissory note payable on demand to the bearer thereof, for any sum of money less than the sum of five pounds, except such promissory note or form of note as aforesaid, of any banker or bankers, or banking companies, or person or persons duly licensed in that behalf, which shall have been duly stamped before the fifth day of February, one thousand eight hundred and twenty-six; and except such promissory note of the governor and company of the Bank of England as shall have [410] been or shall be made out and bear date before the said tenth day of October, one thousand eight hundred and twenty-six; or if any body politic or corporate, or person or persons, shall, after the said fifth day of April, one thousand eight hundred and twenty-nine, make, sign, issue, or reissue in England, any promissory note in writing, payable on demand to the bearer thereof, for any sum of money less than five pounds, then and in either of such cases every such body politic or corporate, or person or persons so making, signing, issuing, or reissuing any such promissory note as aforesaid, except as aforesaid, shall, for every such note so made, signed, issued, or reissued, forfeit the sum of twenty pounds.

IV. And be it further enacted, that if any body politic or corporate, or person or persons, in England, shall, from and after the passing of this act, publish, utter, or negotiate any promissory or other note (not being a note payable to bearer on demand, as is hereinbefore mentioned), or any bill of exchange, draft or undertaking in writing, being negotiable or transferable, for the payment of twenty shillings, or above that sum and less than five pounds, or on which twenty shillings, or above that sum and less than five pounds, shall remain undischarged, made, drawn, or indorsed in any other manner than as is directed by the said act passed in the seventeenth year of the reign of his late Majesty; every such body politic or corporate, or person or persons, so publishing, uttering, or negotiating any such promissory or other note (not being such note payable to bearer on demand, as aforesaid), bill of exchange, draft, or undertaking in writing, as aforesaid, shall forfeit and pay the sum of twenty pounds.

V. And be it further enacted, That the penalties which shall or may be incurred under any of the provisions of this act, and which are in lieu of the penalties imposed by the said act of the seventeenth year of his late Majesty, may be sued for, recovered, levied, mitigated, and applied in such and the same manner as any other penalties imposed by any of the laws now in force relating to the duties under the management of the commissioners of stamps.

IX. Provided always, and be it further enacted, That nothing herein contained shall extend to any draft or order drawn by any person or persons on his, her, or their banker or bankers, or on any person or persons acting as such banker or bankers, for the payment of money held by such banker or bankers, person or persons, to the use of the person or persons by whom such draft or order shall be drawn.

*[7 Geo. 4, c. 46.]

[*411]

An Act for the better regulating Copartnerships of certain Bankers in England; and for amending so much of an Act of the Thirty-ninth and Fortieth Years of the Reign of his late Majesty King George the Third, intituled, "An Act for establishing an Agreement with the Governor and Company of the Bank of England, for advancing the Sum of Three Millions towards the Supply for the service of the Year One Thousand Eight Hundred, as relates to the same." [26th May, 1826.]

"Whereas an act was passed in the thirty-ninth and fortieth years of the reign of his late Majesty King George the Third, intituled, '*An Act for establishing an Agreement with the Governor and Company of the Bank of England, for advancing the Sum of Three Millions towards the Supply for the Service of the Year One Thousand Eight Hundred:*' And whereas it was, to prevent doubts as to the privilege of the said governor and company, enacted and declared in the said recited act, that no other bank should be erected, established, or allowed by Parliament; and that it should not be lawful for any body politic or corporate whatsoever, erected or to be erected, or for any other persons united or to be united in covenants or partnership, exceeding the number of six persons, in that part of Great Britain called England, to borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof, during the continuance of the said privilege to the said governor and company, who were thereby declared to be and remain a corporation, with the privilege of exclusive banking, as before recited; but subject nevertheless to redemption on the terms and conditions in the said act specified. And whereas the governor and company of the Bank of England have consented to relinquish so much of their exclusive privilege as prohibits any body politic or corporate, or any number of persons exceeding six, in England, acting in copartnership, from borrowing, owing, or taking up any sum or sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof: provided that such body politic or corporate, or persons united in covenants or partnerships, exceeding the number of six persons in each copartnership, shall have the whole of their banking establishments, and carry on their business as bankers at any place or places in England exceeding the distance of sixty-five miles from London, and that all the individuals composing such corporations or copartnerships, carrying on such business, shall be

liable to and responsible for the due payment of all bills and notes issued by such corporations or copartnerships respectively :” be it therefore enacted, by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this act, it shall and may be lawful for any bodies politic or corporate, erected for the purposes of banking, or for any number of persons united in covenants or copartnership, although such persons so united or carrying on [*412] business together shall consist of more than *six in number, to carry on the trade or business of bankers in England, in like manner as copartnerships of bankers consisting of not more than six persons in number may lawfully do ; and for such bodies politic or corporate, or such persons so united as aforesaid, to make and issue their bills or notes at any place or places in England exceeding the distance of sixty-five miles from London, payable on demand, or otherwise, at some place or places specified upon such bills or notes, exceeding the distance of sixty-five miles from London, and not elsewhere, and to borrow, owe, or take up any sum or sums of money on their bills or notes so made and issued at any such place or places as aforesaid ; provided always, that such corporations or persons carrying on such trade or business of bankers in copartnership, shall not have any house of business or establishment as bankers in London, or at any place or places not exceeding the distance of sixty-five miles from London ; and that every member of any such corporation or copartnership, shall be liable to and responsible for the due payment of all bills and notes which shall be issued, and for all sums of money which shall be borrowed, owed, or taken up by the corporation or copartnership of which such person shall be a member, such person being a member at the period of the date of the bills or notes, or becoming or being a member before or at the time of the bills or notes being payable, or being such member at the time of the borrowing, owing, or taking up of any sum or sums of money upon any bills or notes by the corporation or copartnership, or while any sum of money on any bills or notes is owing, or unpaid, or at the time the same became due from the corporation or copartnership ; any agreement, covenant, or contract to the contrary notwithstanding.

II. Provided always, and be it further enacted, That nothing in this act contained shall extend to or be construed to extend to enable or authorize any such corporation or copartnership exceeding the number of six persons, so carrying on the trade or business of bankers as aforesaid, either by any member of or person belonging to any such corporation or copartnership or by any agent or agents, or any other person or persons on behalf of any such corporation or copartnership, to issue, or reissue in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill or note of such corporation or copartnership, which shall be payable to bearer on demand, or any bank post-bill ; nor to draw upon any partner or agent or other person or persons who may be resident in London, or at any place or

places not exceeding the distance of sixty-five miles from London, any bill of exchange which shall be payable on demand, or which shall be for a less amount than fifty pounds; provided also, that it shall be lawful, notwithstanding anything herein or in the said recited act contained, for any such corporation or copartnership to draw any bill of exchange for any sum of money amounting to the sum of fifty pounds or upwards, payable either in London, or elsewhere, at any period after date or after sight.

III. Provided also, and be it further enacted, that nothing in *this act contained shall extend to or be construed to extend to [*413] enable or authorize any such corporation or copartnership exceeding the number of six persons, so carrying on the trade or business of bankers in England as aforesaid, or any member, agent or agents of any such corporation or copartnership, to borrow, owe, or take up in London, or at any place or places not exceeding the distance of sixty-five miles from London, any sum or sums of money on any bill or promissory note of any such corporation or copartnership payable on demand, or at any less time than six months from the borrowing thereof, nor to make or issue any bill or bills of exchange, or promissory note or notes of such corporation or copartnership, contrary to the provisions of the said recited act of the thirty-ninth and fortieth years of King George the Third, save as provided by this act on that behalf; provided also, that nothing herein contained shall extend or be construed to extend to prevent any such corporation or copartnership, by any agent or person authorized by them, from discounting, in London or elsewhere, any bill or bills of exchange not drawn by or upon such corporation or copartnership, or by or upon any person on their behalf.

IV. And be it further enacted, That before any such corporation or copartnership exceeding the number of six persons, in England, shall begin to issue any bills or notes, or borrow, owe, or take up any money on their bills or notes, an account or return shall be made out, according to the form contained in the schedule marked (A.) to this act annexed, wherein shall be set forth the true names, title, or form of such intended or existing corporation or copartnership, and also the names and places of abode of all the members of such corporation, or of all the partners concerned or engaged in such copartnership, as the same respectively shall appear on the books of such corporation or copartnership, and the name or firm of every bank or banks established or to be established by such corporation or copartnership, and also the names and places of abode of two or more persons, being members of such corporation or copartnership, and being resident in England, who shall have been appointed public officers of such corporation or copartnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued as hereinafter provided, and also the name of every town and place where any of the bills or notes of such corporation or copart-

nership shall be issued by any such corporation, or by their agent or agents ; and every such amount or return shall be delivered to the commissioners of stamps, at the stamp office in London, who shall cause the same to be filed and kept in the said stamp office, and an entry and registry thereof to be made in a book or books to be there kept for that purpose by some person or persons to be appointed by the said commissioners in that behalf, and which book or books any person or persons shall from time to time have liberty to search and inspect on payment of the sum of one shilling for every search.

[*414] V. And be it further enacted, That such account or return *shall be made out by the secretary or other person, being one of the public officers appointed as aforesaid, and shall be verified by the oath of such secretary or other public officer taken before any justice of the peace, and which oath any justice of the peace is hereby authorized and empowered to administer ; and that such account or return shall, between the twenty-eighth day of February and the twenty-fifth day of March in every year, after such corporation or copartnership shall be formed, be in like manner delivered by such secretary or other public officer as aforesaid to the commissioners of stamps, to be filed and kept in the manner and for the purposes as hereinbefore mentioned.

VI. And be it further enacted, That a copy of any such account or return so filed or kept and registered at the stamp office, as by this act is directed, and which copy shall be certified to be a true copy under the hand or hands of one or more of the commissioners of stamps for the time being, upon proof made that such certificate has been signed with the handwriting of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners, shall in all proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as proof of the appointment and authority of the public officers named in such account or return, and also of the fact that all persons named therein as members of such corporation or copartnership were members thereof at the date of such account or return.

VII. And be it further enacted, That the said commissioners of stamps for the time being shall and they are hereby required, upon application made to them by any person or persons requiring a copy certified according to this act of any such account or returns as aforesaid, in order that the same may be produced in evidence or for any other purpose, to deliver to the person or persons so applying for the same such certified copy, he, she, or they paying for the same the sum of ten shillings and no more.

VIII. Provided also, and be it further enacted, That the secretary or other officer of every such corporation or copartnership shall and he is hereby required, from time to time, as often as occasion shall render it necessary, make out upon oath, in a manner hereinbefore directed, and cause to be

delivered to the commissioners of stamps as aforesaid, a further account or return, according to the form contained in the schedule marked (B.) to this act annexed, of the name or names of any person or persons who shall have been nominated or appointed a new or additional public officer or public officers of such corporation or copartnership, and also of the name or names of any person or persons who shall have ceased to be members of such corporation or copartnership, and also of the name or names of any person or persons who shall have become a member or members of such corporation or copartnership, either in addition to or in the place or stead of any former member or members thereof, and of the name or names of any new or additional town or towns, place or places, where such bills or notes are or are intended to be issued, and where the same are to be made payable; and such further accounts or returns shall *from time to time be filed and kept, and entered, and registered at the stamp office in London, in [*415] like manner as is hereinbefore required with respect to the original or annual account or return hereinbefore directed to be made.

IX. And be it further enacted, That all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons who may be at any time indebted to any such copartnership carrying on business under the provisions of this act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity to be commenced or instituted for, or on behalf of any such copartnership against any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal plaintiff or petitioner for and on behalf of such copartnership; and that all actions or suits, and proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, against such copartnership, shall and lawfully may be commenced, instituted, and prosecuted against any one or more of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal defendant for and on behalf of such copartnership; and that all indictments, informations, and prosecutions by or on behalf of such copartnership, for any stealing or embezzlement of any money, goods, effects, bills, notes, securities, or other property of or belonging to such copartnership, or for any fraud, forgery, crime or offence committed against or with intent to injure or defraud such copartnership, shall and lawfully may be had, preferred, and carried on in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership; and that in all indictments and informations, to be had or preferred by or on behalf of such copartnership against any

person or persons whomsoever, notwithstanding such person or persons may happen to be a member or members of such copartnership, it shall be lawful and sufficient to state the money, goods, effects, bills, notes, securities, or other property of such copartnership, to be the money, goods, effects, bills, notes, securities, or other property of any one of the public officers nominated as aforesaid for the time being of such copartnership; and that any forgery, fraud, crime, or other offence committed against or with intent to injure or defraud any such copartnership, shall and lawfully may in such indictment or indictments, notwithstanding as aforesaid, be laid or stated to have been committed against or with intent to injure or defraud any one of the public officers nominated as aforesaid for the time being of such copartnership; and any offender or offenders may thereupon be lawfully convicted for any such forgery, fraud, crime, or offence; and that in all other allegations, indictments, informations, *or other proceedings of any kind whatsoever, [*416] in which it otherwise might or would have been necessary to state the names of the persons composing such copartnership, it shall and may be lawful and sufficient to state the name of any one of the public officers nominated as aforesaid for the time being of such copartnership; and the death, resignation, removal, or any act of such public officers, shall not abate or prejudice any such action, suit, indictment, information, prosecution, or other proceeding commenced against or by or on behalf of such copartnership, but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such copartnership for the time being.

X. And be it further enacted, That no person or persons, or body or bodies politic or corporate, having or claiming to have any demand upon or against any such corporation or copartnership, shall bring more than one action or suit, in case the merits shall have been tried in such action or suit, in respect of such demand; and the proceedings in any action or suit, by or against any one of the public officers nominated as aforesaid for the time being of any such copartnership, may be pleaded in bar of any other action or actions, suit or suits, for the same demand, by or against any other of the public officers of such copartnership.

XI. And be it further enacted, That all and every decree or decrees, order or orders, made or pronounced in any suit or proceeding in any court of equity against any public officer of any such copartnership carrying on business under the provisions of this act, shall have the like effect and operation upon and against the property and funds of such copartnership, and upon and against the persons and property of every or any member or members thereof, as if every or any such members of such copartnership were parties, members before the court to and in any such suit or proceeding; and that it shall and may be lawful for any court in which such order or decree shall have been made to cause such order and decree to be enforced against every or any member of such copartnership, in like manner as if every member of such copartnership were parties before such court to and,

in such suit or proceeding, and although all such members are not before the court.

XII. And be it further enacted, That all and every judgment or judgments, decree or decrees, which shall at any time after the passing of this act be had or recovered or entered up as aforesaid, in any action, suit, or proceedings in law or equity, against any public officer of any such copartnership, shall have the like effect and operation upon and against the property of such copartnership, and upon and against the property of every such member thereof as aforesaid, as if such judgment or judgments had been recovered or obtained against such copartnership; and that the bankruptcy, insolvency, or stopping payment of any such public officer for the time being of such copartnership in his individual character or capacity, shall not be nor be construed to be the bankruptcy, insolvency, or stopping payment of such copartnership; *and that such copartnership and every member [*417] thereof, and the capital stock and effects of such copartnership, and the effects of every member of such copartnership, shall in all cases, notwithstanding the bankruptcy, insolvency, or stopping payment of any such public officer, be attached and attachable, and be in all respects liable to the lawful claims and demands of the creditor and creditors, of such copartnership, or of any member or members thereof, as if no such bankruptcy, insolvency, or stopping payment of such public officer of such copartnership had happened or taken place.

XIII. And be it further enacted, That execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or copartnership carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership; and that in case any such execution against any member or members for the time being of any such corporation or copartnership shall be ineffectual for obtaining payment or satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the contract or contracts, or engagement or engagements in which such judgment may have been obtained was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: Provided always, that no such execution as last mentioned shall be issued without leave first granted, on motion in open Court, by the Court in which such judgment shall have been obtained, and when motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or copartnership.

XIV. Provided always, and be it further enacted, That every such public officer in whose name any such suit or action shall have been commenced, prosecuted, or defended, and every person or persons against whom execution upon any judgment obtained or entered up as aforesaid in any such action shall be issued as aforesaid, shall always be reimbursed and fully indemnified for all loss, damages, costs, and charges, without deduction, which any such officer or person may have incurred by reason of such execution, out of the funds of such copartnership, or, in failure thereof, by contribution from the other members of such copartnership, as in the ordinary cases of copartnership.

XV. And to prevent any doubts that might arise whether the said governor and company, under and by virtue of their charter, and the several acts of Parliament which have been made and passed in relation to the affairs of the said governor and company, can lawfully carry on the trade or business of banking, otherwise *than under the immediate order, [*418] management, and direction of the court of directors of the said governor and company; be it therefore enacted, That it shall and may be lawful for the said governor and company to authorize and empower any committee or committees, agent or agents, to carry on the trade and business of banking, for and on behalf of the said governor and company, at any place or places in that part of the United Kingdom called England, and for that purpose to invest such committees, agent or agent, with such powers of management and superintendence, and such authority to appoint cashiers and other officers and servants, as may be necessary or convenient for carrying on such trade and business as aforesaid; and for the same purpose to issue to such committee or committees, agent or agents, cashier or cashiers, or other officer or officers, servant or servants, cash, bills of exchange, bank post bills, bank notes, promissory notes, and other securities for payment of money: Provided always, that all such acts of the said governor and company shall be done and exercised in such manner as may be appointed by any by-laws, constitutions, orders, rules, and directions from time to time hereafter to be made by the general court of the said governor and company in that behalf, such by-laws not being repugnant to the laws of that part of the United Kingdom called England; and in all cases where such by-laws, constitutions, orders, rules, or directions of the said general court shall be wanting, in such manner as the governor, deputy-governor, and directors, or the major part of them assembled, whereof the said governor or deputy-governor is always to be one, shall or may direct, such directions not being repugnant to the laws of that part of the United Kingdom called England; anything in the said charter or acts of Parliament, or other law, usage, matter, or thing to the contrary thereof notwithstanding: Provided always, that in any place where the trade and business of banking shall be carried on for and on behalf of the said governor and company of the Bank of England, any promissory note issued on their account in such place shall be made payable in coin in such place as well as in London.

XVI. And be it further enacted, That if any corporation or copartnership carrying on the trade or business of bankers under the authority of this act, shall be desirous of issuing and reissuing notes in the nature of bank notes, payable to the bearer on demand, without the same being stamped as by law is required, it shall be lawful for them so to do on giving security by bond to his Majesty, his heirs and successors, in which bond two of the directors, members, or partners of such corporation or copartnership shall be the obligors, together with the cashier or cashiers, or accountant or accountants, employed by such corporation or copartnership, as the said commissioners of stamps shall require; and such bonds shall be taken in such reasonable sums as the duties may amount unto during the period of one year, with condition to deliver to the said commissioners of stamps, within fourteen days after the fifth day of January, the fifth day of April, the fifth day of July, and the tenth day of October in every year, whilst the present stamp duties shall remain in force, a just and true account, verified upon the oaths or affirmations of two directors, members, or partners of such *corporation or copartnership, and of the said cashier or cashiers, accountant or ac- [*419] countants, or such of them as the said commissioners of stamps shall require, such oaths or affirmations to be taken before any justice of the peace, and which oaths or affirmations any justice of the peace is hereby authorized and empowered to administer, of the amount or value of all their promissory notes in circulation on some given day in every week, for the space of one quarter of a year prior to the quarter day immediately preceding the delivery of such account, together with the average amount or value thereof according to such account; and also to pay or cause to be paid into the hands of the receivers-general of stamp duties in Great Britain, as a composition for the duties which would otherwise have been payable for such promissory notes issued within the space of one year, the sum of seven shillings for every one hundred pounds, and also for the fractional part of one hundred pounds of the said average amount or value of such notes in circulation, according to the true intent and meaning of this act; and on due performance thereof, such bond shall be void; and it shall be lawful for the said commissioners to fix the time or times of making such payment, and to specify the same in the condition to every such bond; and every such bond may be required to be renewed from time to time, at the discretion of the said commissioners or the major part of them, and as often as the same shall be forfeited, or the party or parties to the same, or any of them, shall die, become bankrupt or insolvent, or reside in parts beyond the seas.

XVII. Provided always, and be it further enacted, That no such corporation or copartnership shall be obliged to take out more than four licenses for the issuing of any promissory notes for money payable to the bearer on demand, allowed by law to be reissued in all for any number of towns or places in England; and in case any such corporation or copartnership shall issue such promissory notes as aforesaid, by themselves or their agents, at more than four different towns or places in England, then after taking out

three distinct licenses for three of such towns or places, such corporation or copartnership shall be entitled to have all the rest of such towns or places included in the fourth license.

XVIII. And be it further enacted, That if any such corporation or copartnership exceeding the number of six persons in England shall begin to issue any bills or notes, or to borrow, owe, or take up any money on their bills or notes, without having caused such account or return as aforesaid to be made out and delivered in the manner and form directed by this act, or shall neglect or omit to cause such account or return to be renewed yearly and every year, between the days or times hereinbefore appointed for that purpose, such corporation or copartnership so offending shall for each and every week they shall so neglect to make such account and return, forfeit the sum of five hundred pounds; and if any secretary or other officer of such corporation or copartnership shall make out or sign any false account or return, or any account or return which shall not truly set forth all the several particulars [*420] by this act required to be contained or inserted in such account or return, the *corporation or copartnership to which such secretary or other officer so offending shall belong, shall for every such offence forfeit the sum of five hundred pounds, and the said secretary or other officer so offending shall also for every such offence forfeit the sum of one hundred pounds; and if any such secretary or other officer making out or signing any such account or return as aforesaid shall knowingly and wilfully make a false oath of, for, or concerning any of the matters to be therein specified and set forth, every such secretary or other officer so offending, and being thereof lawfully convicted, shall be subject and liable to such pains and penalties as by any law now in force persons convicted of wilful and corrupt perjury are subjected and liable to.

XIX. And be it further enacted, That if any such corporation or copartnership exceeding the number of six persons, so carrying on the trade or business of bankers as aforesaid, shall, either by any member of or person belonging to any such corporation or copartnership, or by any agent or agents, or any other person or persons on behalf of any such corporation or copartnership, issue or reissue in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill or note of such corporation or copartnership which shall be payable on demand; or shall draw upon any partner or agent, or other person or persons who may be resident in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill of exchange which shall be payable on demand, or which shall be for a less amount than fifty pounds; or if any such corporation or copartnership exceeding the number of six persons, so carrying on the trade or business of bankers in England as aforesaid, or any member, agent, or agents of any such corporation or copartnership, shall borrow, owe, or take up in London, or at any place or places not exceeding the distance of sixty-five miles from London, any sum or sums of money on any bill or

promissory note of any such corporation or copartnership payable on demand, or at any less time than six months from the borrowing thereof, or shall make or issue any bill or bills of exchange or promissory note or notes of such corporation or copartnership contrary to the provisions of the said recited act of the thirty-ninth and fortieth years of King George the Third, save as provided by this act, such corporation or copartnership so offending, or on whose account and behalf any such offence as aforesaid shall be committed, shall for every such offence forfeit the sum of fifty pounds.

XX. Provided also, and be it further enacted, That nothing in this act contained shall extend or be construed to extend to prejudice, alter, or affect any of the rights, powers, or privileges of the said governor and company of the Bank of England; except as the said exclusive privilege of the said governor and company is by this act specially altered and varied.

XXI. And be it further enacted, That all pecuniary penalties and forfeitures imposed by this act shall and may be sued for and recovered in his Majesty's Court of Exchequer at Westminster, in the same manner as penalties incurred under any act or acts *relating to stamp duties may [*421] be sued for and recovered in such Court.

XXII. And be it further enacted, That this act may be altered, amended, or repealed by any act or acts to be passed in this present session of Parliament.

SCHEDULES referred to by this Act.

SCHEDULE (A.)

Return or account to be entered at the stamp office in London, in pursuance of an act passed in the seventh year of the reign of King George the Fourth, intituled [*here insert the title of this act*], viz.

Firm or name of the banking corporation or copartnership, viz. [*set forth the firm or name.*]

Names and places of abode of all the partners concerned or engaged in such corporation or copartnership, viz. [*set forth all the names and places of abode.*]

Names and places of the bank or banks established by such corporation or copartnership, viz. [*set forth all the names and places.*]

Names and descriptions of the public officers of the said banking corporation or copartnership, viz. [*set forth all the names and descriptions.*]

Names of the several towns and places where the bills or notes of the said banking corporation or copartnership are to be issued by the said corporation or copartnership, or their agent or agents, viz. [*set forth the names of all the towns and places.*]

Sworn before me, the day of at in the
county of

C. D. Justice of the peace in and for the
said county.

***SCHEDULE (B.)**

Name of any and every new or additional public officer of the said corporation or copartnership: *viz.*

A. B. in the room of C. D. deceased or removed [*as the case may be*]
[*set forth every name*].

Name of any and every person who may have ceased to be a member of such corporation or copartnership; viz. *[set forth every name.]*

Name of any and every person who may have become a new member of such corporation or copartnership. [set forth every name.]

Names of any additional towns or places where bills or notes are to be issued
and where the same are to be made payable.

A. B. of secretary [or other officer] of the above-named corporation or copartnership, maketh oath and saith that the above doth contain the name and place of abode of any and every person who hath become or been appointed a public officer of the above corporation or copartnership, and also the name and place of abode of any and every person who hath ceased to be a member of the said corporation or copartnership, and of any and every person who hath become a member of the said copartnership since the registry of the said corporation or copartnership on the day of last, as the same respectively appear on the books of the said corporation or copartnership, and to the best of the information, knowledge, and belief of the deponent.

Sworn before me the day of at in the county of
C. D. Justice of the peace in and for the
said county.

[7 & 8 Geo. 4, c. 15.]

An Act for declaring the Law in relation to Bills of Exchange and Promissory Notes becoming payable on Good Friday or Christmas Day.

[12th April, 1827.]

“Whereas an act was passed in the thirty-ninth and fortieth years of the reign of his late Majesty King George the Third, intituled, ‘*An Act for the better Observance of Good Friday, in certain cases therein mentioned* ;’ and it was thereby enacted, that where bills of exchange and promissory notes became due and payable on Good Friday, the same should, from and after the first *day of June then next ensuing, be payable on the day [*423] before Good Friday; and that the holder or holders of such bills of exchange or promissory notes might note and protest the same for non-payment on the day preceding Good Friday, in like manner as if the same had fallen due and become payable on the day preceding Good Friday; and that such noting and protest should have the same effect and operation at law as if such bills or promissory notes had fallen due and become payable on the day preceding Good Friday, in the same manner as was usual in cases of bills of exchange and promissory notes coming due on the day before any Lord’s Day commonly called Sunday, and before the feast of the Nativity, or birthday of our Lord, commonly called Christmas Day; and whereas, notwithstanding the said recited act, and notwithstanding the general custom of merchants, doubts have arisen whether notice of the dishonor of bills of exchange and promissory notes not falling due on any Good Friday, or on any Christmas Day, should not be given on such Good Friday, or Christmas Day respectively, and whether, in cases where bills of exchange and promissory notes fall due on the day preceding any Good Friday or Christmas Day, notice of the dishonor thereof should not be given on the Good Friday or the Christmas Day next after the same bills of exchange and promissory notes so fall due; and it is expedient that such doubts should be removed :” be it therefore declared and enacted, by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That from and immediately after the tenth day of April, one thousand eight hundred and twenty-seven, in all cases where bills of exchange or promissory notes shall be payable, either under or by virtue of the said recited act, or otherwise, on the day preceding any Good Friday, or on the day preceding any Christmas Day, it shall not be necessary for the holder or holders of such bills of exchange or promissory notes to give notice of the dishonor thereof until the day next after such Good Friday or Christmas Day; and

that whenever Christmas Day shall fall on Monday, it shall not be necessary for the holder or holders of such bills of exchange or promissory notes as shall be payable on the preceding Saturday, to give notice of the dishonor thereof until the Tuesday next after such Christmas Day; and that every such notice given as aforesaid, shall be valid and effectual to all intents and purposes.

II. And whereas similar doubts have existed with respect to bills of exchange and promissory notes falling due upon days appointed by his Majesty's proclamation for solemn fasts, or days of thanksgiving, or upon the day next preceding such days respectively, and it is expedient that such doubts should be removed; be it therefore further declared and enacted, That from and after the said tenth day of April, one thousand eight hundred and twenty-seven, in all cases where bills of exchange or promissory notes shall become due and payable on any day appointed by his Majesty's proclamation for a day of solemn fast or a day of thanksgiving, the same shall be payable on the day next preceding such day of fast or day of thanksgiving, and in case of non-
[*424] payment, *may be noted and protested on such preceding day; and that, as well in such cases as in the case of bills of exchange and promissory notes becoming due and payable on the day preceding any such day of fast or day of thanksgiving, it shall not be necessary for the holder or holders of such bills of exchange and promissory notes to give notice of the dishonor thereof until the day next after such day of fast or day of thanksgiving; and that, whensoever such day of fast or day of thanksgiving shall be appointed on a Monday, it shall not be necessary for the holder or holders of such bills of exchange or promissory notes as shall be payable on the preceding Saturday, to give notice of the dishonor thereof until the Tuesday next after such day of fast or day of thanksgiving respectively, and that every such notice so given as aforesaid, shall be valid and effectual, to all intents and purposes.

III. And be it further enacted, That from and after the said tenth of April, one thousand eight hundred and twenty-seven, Good Friday and Christmas Day, and every such day of fast or thanksgiving so appointed by his Majesty, is and shall, for all other purposes whatever, as regards bills of exchange and promissory notes, be treated and considered as the Lord's Day, commonly called Sunday.

IV. Provided always, and be it further enacted, That nothing in this act contained shall extend, or be construed to extend, to that part of the United Kingdom called Scotland.

[7 & 8 Geo. 4, c. 29.]

An Act for consolidating and amending the Laws in England relative to Larceny and other Offences connected therewith. [21st June, 1827.]

V. And be it enacted, That if any person shall steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company or society, or to any deposit in any savings bank, or shall steal any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, for money or for payment of money, whether of this kingdom, or of any foreign state, or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing, every such offender shall be deemed guilty of felony, of the same nature and in the same degree, and punishable in the same manner, as if he had stolen any chattel of like value with the share, interest, or deposit, to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable things mentioned in the warrant or order; and each of the several documents *hereinbefore enumerated shall, throughout this act, be deemed for every purpose to be included under, and denoted [*425] by, the words "valuable security."

XLIX. And, for the punishment of embezzlements committed by agents intrusted with property, be it enacted, That if any money, or security for the payment of money, shall be intrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money, or any part thereof, or the proceeds or any part of the proceeds of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in anywise convert to his own use or benefit such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the Court shall award; and if any chattel, or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or in any foreign state, or in any fund of any body corporate, company or society, shall be intrusted to any banker, merchant, broker, attorney or other agent, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney, shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit

such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned.

L. Provided always, and be it enacted, That nothing hereinbefore contained relating to agents shall affect any trustee in or under any instrument whatever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee, in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand, entitling him by law so to do, unless such sale, transfer, or other disposal, shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand.

[*426]

*[9 Geo. 4, c. 14.]

An Act for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements. . [9th May, 1828.]

“Whereas, by an act passed in England, in the twenty-first year of the reign of King James the First, it was, among other things, enacted, that all actions of account and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, should be commenced within three years after the end of the then present session of Parliament, or within six years next after the cause of such actions or suits, and not after: and whereas a similar enactment was contained in an act passed in Ireland, in the tenth year of the reign of King Charles the First; and whereas various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments; and it is expedient to prevent such questions, and to make provisions for giving effect to the said enactments; and to the intention thereof:” be it therefore enacted, by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That, in actions of

debt or upon the case, grounded upon any simple contract, no acknowledgment or promise *by words only* shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some *writing, to be signed by the party chargeable thereby*; and that, where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, or executor, or administrator, shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any *written acknowledgment* or promise, made and signed by any other or others of them: provided always that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever: provided also, that, in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear, at the trial or otherwise, that the plaintiff, though barred by either of the said recited acts or this act, as to one or more such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, or for the other defendant or defendants, against the plaintiff.

*III. And be it further enacted, That no indorsement or memorandum of any payment, written or made after the time appointed [*427] for this act to take effect, upon every promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the cause out of the operation of either of the said statutes.

IV. And be it further enacted, That the said recited acts, and this act, shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise.

V. And be it further enacted, That no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification, after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith.

VIII. And it be further enacted, That no memorandum or other writing, made necessary by this act, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps.

[9 Geo. 4, c. 15.]

An Act to prevent a Failure of Justice by Reason of Variance between Records and Writings produced in Evidence in support thereof.

[9th May, 1828.]

“Whereas great expense is often incurred, and delay or failure of justice takes place, at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time;” for remedy thereof, be it enacted, by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That it shall and may be lawful for every Court of record holding plea in civil actions, and judge sitting at nisi prius, and any Court of oyer and terminer and general jail-delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such Court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or Court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall [*428] appear between any matter in writing or in print *produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the Court, on payment of such costs (if any) to the other party, as such judge or Court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at nisi prius, the order for the amendment shall be indorsed on the postea, and returned together with the record; and thereupon the papers, rolls, and other records of the Court from which such record issued, shall be amended accordingly.

[9 Geo. 4, c. 23.]

An Act to enable Bankers in England to issue certain unstamped Promissory notes and Bills of Exchange, upon Payment of a Composition in Lieu of the Stamp Duties thereon.

[9th June, 1828.]

“Whereas it is expedient to permit all persons carrying on the business of bankers in England (except within the city of London, or within three miles thereof), to issue their promissory notes, payable to bearer on demand, or to order, within a limited period after sight, and to draw bills of exchange payable to order on demand, or within a limited period after sight or date, on unstamped paper, on payment of a composition in lieu of the stamp duties

which would otherwise be payable upon such notes and bills respectively, and subject to the regulations hereinafter mentioned :” be it therefore enacted, by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That, from and after the first day of July, one thousand eight hundred and twenty-eight, it shall be lawful for any person or persons carrying on the business of a banker or bankers in England (*except within the city of London, or within three miles thereof*), having first duly obtained a license for that purpose, and given security by bond in manner hereinafter mentioned, to issue, on unstamped paper, *promissory notes for any sum of money amounting to five pounds and upwards*, expressed to be payable to the bearer on demand, or to order, at any period not exceeding seven days after sight ; and also to draw and issue, on unstamped paper, bills of exchange, expressed to be payable to order on demand, or at any period not exceeding seven days after sight, or twenty-one days after the date thereof, provided such bills of exchange be drawn upon a person or persons carrying on the business of a banker or bankers, in London, Westminster, or the borough of Southwark, or provided such bills of exchange be drawn by any banker or bankers, at a town or place where he or they shall be duly licensed to issue unstamped notes and bills, under the authority of this act, upon himself or themselves, or his or their *copartner or copartners, payable at any other town or place [*429] where such banker or bankers shall also be duly licensed to issue such notes and bills as aforesaid.

XII. And be it further enacted, That if any person or persons, who shall be licensed under the provisions of this act, shall draw or issue, or cause to be drawn or issued, upon unstamped paper, any promissory note payable to order, or any bill of exchange, which shall bear date subsequent to the day on which it shall be issued, the person or persons so offending, shall, for every such note or bill so drawn or issued, forfeit the sum of one hundred pounds.

[9 Geo. 4; c. 49, s. 15.]

An Act to amend the Laws in Force relating to the Stamp Duties on Sea Insurances, on articles of Clerkship, on Certificates of Writers to the Signet, and of Conveyancers and others, on Licenses to Dealers in Gold and Silver Plate and Pawnbrokers, on Drafts on Bankers, and on Licenses for Stage Coaches in Great Britain, and on Receipts in Ireland.

[15th July, 1828.]

XV. And be it further enacted, That, from and after the passing of this act, all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn in any part of Great Britain upon any banker or

bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker within fifteen miles of the place where such drafts or orders shall be issued, shall be, and the same are hereby exempted from any stamp duty imposed by any act or acts in force immediately before the passing of this act, anything in any such act or acts to the contrary notwithstanding; provided the place where such drafts or orders shall be issued shall be specified therein, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes.

[*430]

*[9 Geo. 4, c. 65.]

An Act to restrain the Negotiation in England of Promissory Notes and Bills under a limited Sum, issued in Scotland or Ireland.

[15 July, 1828.]

“Whereas an act was passed in the seventh year of his present Majesty’s reign, intituled, ‘*An Act to limit, and after a certain period to prohibit, the issuing of Promissory Notes, under a limited Sum, in England,*’ and doubts may arise how far the provisions of the said act may be effectual to restrain the circulating, in England, of certain notes, drafts, or undertakings, made or issued in Scotland or Ireland;” be it therefore enacted by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That if any body politic or corporate, or person or persons, shall, after the fifth day of April, one thousand eight hundred and twenty-nine, by any art, device or means whatsoever, publish, utter, negotiate, or transfer in any part of England, any promissory or other note, draft, engagement, or undertaking in writing, made payable on demand to the bearer thereof, and being negotiable or transferable, for the payment of any sum of money less than five pounds, or on which less than the sum of five pounds shall remain undischarged, which shall have been made or issued, or shall purport to have been made or issued, in Scotland or Ireland, or elsewhere out of England, wheresoever the same shall or may be payable, every such body politic or corporate, or person or persons, so publishing, uttering, negotiating, or transferring, any such note, bill, draft, engagement or undertaking, in any part of England, shall forfeit and pay for every such offence any sum not exceeding twenty pounds, nor less than five pounds, at the discretion of the justice of the peace who shall hear and determine such offence.

[11 Geo. 4 and 1 Wm. 4, c. 66.]

An Act for reducing into One Act all such Forgeries as shall henceforth be punished with Death, and for otherwise amending the Laws relating to Forgery.

[22d July, 1830.]

III. And be it enacted, That if any person shall forge or alter, or shall

offer, utter, dispose of, or put off, knowing the same to be forged or altered, any exchequer bill or exchequer debenture, or any indorsement on or assignment of any exchequer bill or exchequer debenture, or any bond under the common seal of the united company of merchants of England trading to the East Indies, commonly called an East India bond, or any indorsement on, or assignment of any East India bond, or any note or bill of exchange of the governor and company of the Bank of England, commonly *called a bank note, a bank bill of exchange, or a bank post-bill, or any in- [*431] dorsement on, or assignment of, any bank note, bank bill of exchange, or bank post-bill, or any will, testament, codicil, or testamentary writing, or any bill of exchange or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, with intent, in any of the cases aforesaid, to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

IV. And be it declared and enacted, That where by any act now in force any person is made liable to the punishment of death for forging or altering, or for offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any instrument or writing designated in such act by any special name or description, and such instrument or writing, however designated, is in law a will, testament, codicil or testamentary writing, or a bill of exchange or promissory note for the payment of money, or an indorsement on or an assignment of a bill of exchange or promissory note for the payment of money, or an acceptance of a bill of exchange, or an undertaking, warrant or order for the payment of money, within the true intent and meaning of this act, in every such case the person forging or altering such instrument or writing, or offering or uttering, disposing of, or putting off such instrument or writing, knowing the same to be forged or altered, may be indicted as an offender against this act, and punished with death accordingly.

V. And be it enacted, That if any person shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the governor and company of the Bank of England, or by the governor and company of merchants of Great Britain trading to the South Seas and other parts of America, and for encouraging the fishery, commonly called the South Sea Company, in which books the accounts of the owners of any stock annuities, or other public funds which now are or hereafter may be transferable at the Bank of England or at the South Sea House shall be entered and kept, or shall in any manner wilfully falsify the accounts of such owners in any of the said books, with intent in any of the cases aforesaid to defraud any person whatsoever; or if any person shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England

or at the South Sea House, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud any person whatsoever; every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

XIII. And be it enacted, That if any person shall, without the authority of the governor and company of the Bank of England, to be proved by the party [*432] accused, make or use, or shall, without *lawful excuse, to be proved by the party accused, knowingly have in his custody or possession, any frame, mould, or instrument for the making of paper with the words "Bank of England" visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount, expressed in a word or words in roman letters, visible in the substance of the paper; or if any person shall, without such authority to be proved as aforesaid, manufacture, use, sell, expose to sale, utter, or dispose of, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his possession any paper whatsoever with the words "Bank of England" visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount, expressed in a word or words in roman letters, appearing visible in the substance of the paper; or if any person, without such authority, to be proved as aforesaid, shall, by any art or contrivance, cause the words "Bank of England" to appear visible in the substance of any paper, or cause the numerical sum or amount of any bank note, bank bill of exchange, or bank post-bill, blank bank note, blank bank bill of exchange or blank bank post-bill, in a word or words in roman letters, to appear visible in the substance of the paper, whereon the same shall be written or printed; every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years.

XIV. Provided always, and be it enacted, That nothing herein contained shall prevent any person from issuing any bill of exchange or promissory note having the amount thereof expressed in guineas, or in numerical figure or figures denoting the amount thereof in pounds sterling, appearing visible in the substance of the paper upon which the same shall be written or printed, nor shall prevent any person from making, using, or selling any paper having waving or curved lines, or any other devices in the nature of watermarks, visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines or watermarks of the paper used by the governor and company of the Bank of England.

XV. And be it enacted, That if any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any promissory note or bill of exchange, or blank promissory note or blank

bill of exchange, or part of a promissory note or bill of exchange, purporting to be a bank note, bank bill of exchange, or bank post-bill, or blank bank note, blank bank bill of exchange, or blank bank post-bill, or part of a bank note, bank bill of exchange, or bank post-bill, without the authority of the governor and company of the Bank of England, to be proved by the party accused; or if any person shall use such plate, wood, stone, or other material, or any other instrument or device, for the making or printing any bank note, bank bill of exchange, or bank post-bill, or blank bank note, blank bank bill of exchange, or blank bank post-bill, or part of a bank note, bank bill of exchange, or bank post-bill, without such authority, to be proved as aforesaid; or if any person shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off any paper upon which any blank bank note, blank bank bill of exchange, or blank bank *post-bill, or [*433] part of a bank note, bank bill of exchange, or bank post-bill, shall be made or printed; or if any person shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any such paper; every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years.

XVI. And be it enacted, That if any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any word, number, figure, character, or ornament, the impression taken from which shall resemble, or apparently be intended to resemble, any part of a bank note, bank bill of exchange, or bank post-bill, without the authority of the governor and company of the Bank of England, to be proved by the party accused; or if any person shall use any such plate, wood, stone, or other material, or any other instrument or device, for the making upon any paper or other material the impression of any word, number, figure, character, or ornament which shall resemble, or apparently be intended to resemble any part of a bank note, bank bill of exchange, or bank post-bill, without such authority, to be proved as aforesaid; or if any person shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off any paper or other material upon which there shall be an impression of any such matter aforesaid; or if any person shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper or other material upon which there shall be an impression of any such matter as aforesaid; every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years.

XVII. And be it enacted, That if any person shall make or use any frame, mould, or instrument for the manufacture of paper with the name or firm of any person or persons, body corporate, or company carrying on the business of bankers (other than and except the Bank of England), appearing visible in the substance of the paper, without the authority of such person or persons, body corporate, or company, the proof of which authority shall lie on the party accused; or if any person shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such frame, mould, or instrument; or if any person shall, [*434] without such authority, to be proved as *aforesaid*, manufacture, use, sell, expose to sale, utter, or dispose of, or shall, without lawful excuse, to be proved as *aforesaid*, knowingly have in his custody or possession, any paper in the substance of which the name or firm of any such person or persons, body corporate, or company carrying on the business of bankers, shall appear visible; or if any person shall without such authority, to be proved as *aforesaid*, cause the name or firm of any such person or persons, body corporate or company carrying on the business of bankers to appear visible in the substance of the paper, upon which the same shall be written or printed; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years, nor less than one year.

XVIII. And be it enacted, That if any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange or promissory note for the payment of money, or any part of any bill of exchange or promissory note for the payment of money, purporting to be the bill or note, or part of the bill or note, of any person or persons, body corporate or company carrying on the business of bankers (other than and except the Bank of England), without the authority of such person or persons, body corporate, or company, the proof of which authority shall lie on the party accused: or if any person shall engrave or make upon any plate whatever, or upon any wood, stone, or other material, any word or words resembling, or apparently intended to resemble, any subscription subjoined to any bill of exchange or promissory note for the payment of money issued by any such person or persons, body corporate or company carrying on the business of bankers, without such authority, to be proved as *aforesaid*; or if any person shall, without such authority, to be proved as *aforesaid*, use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession, any plate, wood, stone, or other material upon which any such bill or note, or part thereof, or any word or words resembling or apparently intended to resemble such subscription, shall be engraved or made; or if any person shall, without such authority, to be proved as *aforesaid*, knowingly offer, utter, dispose of, or put off, or shall, without lawful excuse, to be proved as *aforesaid*, knowingly have in his cus-

tody or possession any paper upon which any part of such bill or note, or any word or words resembling, or apparently intended to resemble, any such subscription, shall be made or printed; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year.

XIX. And be it enacted, That if any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange, promissory note, *undertaking, or order for payment of money, or any part of any bill of exchange, promissory note, undertaking, or order for payment of money, in whatever language or languages the same may be expressed, and whether the same shall or shall not be or be intended to be under seal, purporting to be the bill, note, undertaking, or order, or part of the bill, note, undertaking, or order, of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate, or body of the like nature, constituted or recognized by any foreign prince or state, or of any person or company of persons resident in any country, not under the dominion of his Majesty, without the authority of such foreign prince or state, minister or officer, body corporate, or body of the like nature, person or company of persons, the proof of which authority shall lie on the party accused; or if any person shall, without such authority, to be proved as aforesaid, use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession, any plate, stone, wood, or other material upon which any such foreign bill, note, undertaking, or order, or any part thereof, shall be engraved or made; or if any person shall, without such authority, to be proved as aforesaid, knowingly utter, dispose of, or put off, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession, any paper upon which any part of such foreign bill, note, undertaking, or order shall be made or printed; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year.

XXVIII. And be it declared and enacted, That where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act;

and where the committing any offence with intent to defraud any person whatsoever is made punishable by this act, in every such case the word "person" shall throughout this act be deemed to include his Majesty or any foreign prince or state, or any body corporate, or any company or society of persons not incorporated, or any person or number of persons whatsoever who may be intended to be defrauded by such offence, whether such body corporate, company, society, person or number of persons shall reside or carry on business in England or elsewhere, in any place or country, whether under the dominion of his Majesty or not; and it shall be sufficient in any indictment to name one person only of such company, society, or number of [*436] persons, and to *allege the offence to have been committed with intent to defraud the person so named, and another or others, as the case may be.

XXX. Provided always, and be it declared and enacted, That where the forging or altering any writing or matter whatsoever, or the offering, uttering, disposing of, or putting off any writing or matter whatsoever, knowing the same to be forged or altered, is in this act expressed to be an offence, if any person shall, in that part of the United Kingdom called England, forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any such writing or matter, in whatsoever place or country out of England, whether under the dominion of his Majesty or not, such writing or matter may purport to be made or may have been made, and in whatever language or languages the same or any part thereof may be expressed, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made or had been made in England; and if any person shall in England forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange or any promissory note for the payment of money, or any indorsement on, or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant or order for the payment of money, or any deed, bond or writing obligatory for the payment of money (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose), in whatever place or country out of England, whether under the dominion of his Majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, deed, bond, or writing obligatory may be or may purport to be payable, and in whatever language or languages the same respectively or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, or order be or be not under seal, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in England.

*[2 & 3 Wm. 4, c. 98.]

[*437]

An Act for regulating the Protesting for Non-payment of Bills of Exchange drawn payable at a place not being the Place of the residence of the Drawee or Drawees of the same. [9th August, 1832.]

“Whereas doubts having arisen as to the place in which it is requisite to protest for non-payment bills of exchange, which on the presentment for acceptance to the drawee or drawees shall not have been accepted, such bills of exchange being made payable at a place other than the place mentioned therein to be the residence of the drawee or drawees thereof, and it is expedient to remove such doubts;” be it therefore enacted by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this act all bills of exchange wherein the drawer or drawers thereof shall have expressed that such bills of exchange are to be payable in any place other than the place by him or them therein mentioned to be the residence of the drawee or drawees thereof, and which shall not on the presentment for acceptance thereof be accepted, shall or may be, without further presentment to the drawee or drawees, protested for non-payment in the place in which such bills of exchange shall have been by the drawer or drawers expressed to be payable, unless the amount owing upon such bills of exchange shall have been paid to the holder or holders thereof on the day on which such bills of exchange would have become payable, had the same been duly accepted.

[3 & 4 Wm. 4, c. 42.]

An Act for the further Amendment of the Law, and the better Advancement of Justice. [14th August, 1833.]

“Whereas it would greatly contribute to the diminishing of expense in suits in the superior Courts of common law at Westminster if the pleadings therein were in some respects altered, and the questions to be tried by the jury left less at large than they now are according to the course and practice of pleading in several forms of action; but this cannot be conveniently done otherwise than by rules or orders of the judges of the said Courts from time to time to be made, and doubts may arise as to the power of the said judges to make such alterations without the authority of the Parliament;” be it therefore enacted by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That the Judges of the said superior Courts, or any eight or more of them, of whom the chiefs *of each of the said Courts shall be three, shall and may, by any rule or order to be from time to time by them made, in term or

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vacation, at any time within five years from the time when this act shall take effect, make such alterations in the mode of pleading in the said Courts, and in the mode of entering and transcribing pleadings, judgments, and other proceeding in actions at law, and such regulations as to the payment of costs, and otherwise for carrying into effect the said alterations, as to them may seem expedient; and all such rules, orders, or regulations shall be laid before both houses of Parliament, if Parliament be then sitting, immediately upon the making of the same, or if Parliament be not sitting, then within five days after the next meeting thereof, and no such rule, order, or regulation, shall have effect until six weeks after the same shall have been so laid before both houses of Parliament; and any rule or order so made shall, from and after such time aforesaid, be binding and obligatory on the said Courts, and all other Courts of common law, and on all Courts of error into which the judgments of the said Courts, or any of them, shall be carried by any writ of error, and be of the like force and effect as if the provisions contained therein had been expressly enacted by Parliament: provided always, that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now or hereafter shall be entitled to do so by virtue of any act of Parliament now or hereafter to be in force.

XII. And be it further enacted, that in all actions upon bills of exchange, or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration to designate such persons by the same initial letter or letters, or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full.

XIII. And be it further enacted, That no wager of law shall be hereafter allowed.

XIV. And be it further enacted, that an action of debt on simple contract shall be maintainable in any Court of common law against any executor or administrator.

XV. "And whereas it is expedient to lessen the expense of the proof of written or printed documents, or copies thereof, on the trial of causes;" be it further enacted, That it shall and may be lawful for the said Judges, or any such eight or more of them as aforesaid, at any time within five years after this act shall take effect, to make regulations, by general rules or orders, from time to time, in term or in vacation, touching the voluntary admission, upon an application for that purpose, at a reasonable time before the trial, of one party to the other, of all such written or printed documents or copies of documents as are intended to be offered in evidence on the said trial by the party requiring such admission, *and touching the inspection thereof [*439] before such admission is made, and touching the costs which may be

incurred by the proof of such documents or copies on the trial of the cause in case of the omitting to apply for such admission, or the not producing of such document or copies for the purpose of obtaining admission thereof, or of the refusal to make such admission, as the case may be, and as to the said Judges shall seem meet; and all such rules and orders shall be binding and obligatory in all Courts of common law, and of the like force as if the provisions therein contained had been expressly enacted by Parliament.

XVI. "And whereas it would also lessen the expense of trials and prevent delay if such writs of inquiry as hereinafter mentioned were executed, and such issues as hereinafter mentioned were tried, before the sheriff of the county where the venue is laid;" be it therefore enacted, that all writs issued under and by virtue of the statute passed in the session of Parliament held in the eighth and ninth years of the reign of King William the Third, intituled, "*An Act for the better preventing Frivolous and Vexatious Suits*," shall, unless the Court where such action is pending, or a Judge of one of the said superior Courts shall otherwise order, direct the sheriff of the county where the action shall be brought to summon a jury to appear before such sheriff, instead of the justices or justice of assize or nisi prius of that county, to inquire of the truth of the breaches suggested, and assess the damages that the plaintiff shall have sustained thereby, and shall command the said sheriff to make return thereof to the Court from whence the same shall issue at a day certain, in term or in vacation, in such writ to be mentioned; and such proceedings shall be had after the return of such writ as are in the said statute in that behalf mentioned, in like manner as if such writ had been executed before a justice of assize or nisi prius.

XVII. And be it further enacted, That in any action depending in any of the said superior Courts for any debt or demand in which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed twenty pounds, it shall be lawful for the Court in which such suit shall be pending, or any Judge of any of the said Courts, if such Court or Judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such Court or Judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any Judge of any Court of record for the recovery of debt in such county, and for that purpose a writ shall issue directed to such sheriff, commanding him to try such issue or issues by a jury to be summoned by him, and to return such writ, with the finding of the jury thereon indorsed, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or Judge shall summon a jury, and proceed to try such issue or issues.

XVIII. And be it further enacted, that at the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution *issued forthwith, unless the sheriff or his deputy before whom such writ of inquiry may be [*440]

executed, or such sheriff, deputy, or Judge before whom such trial shall be had, shall certify under his hand upon such writ that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the Court for a new inquiry or trial, or a Judge of any of the said Courts shall think fit to order that judgment or execution shall be stayed till a day be named in such order ; and the verdict of such jury, on the trial of such issue or issues, shall be as valid and of the like force as a verdict of a jury at nisi prius ; and the sheriff, or his deputy, or Judge, presiding at the trial of such issue or issues, shall have the like powers, with respect to amendment on such trial, as are hereinafter given to Judges at nisi prius.

XXIII. And whereas great expense is often incurred, and delay or failure of justice takes place at trials by reason of variance as to some particular or particulars between the proof and the record, or setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record ; and whereas it is expedient to allow such amendments as hereinafter mentioned to be made on the trial of the cause : be it therefore enacted, That it shall be lawful for any Court of record holding plea in civil actions, and any Judge sitting at nisi prius, if such Court or Judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such Court or Judge, in any civil action, or in any information in the nature of a quo warranto, or proceedings on a mandamus, when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars, in the judgment of such Court or Judge, not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the Court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms, as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such Court or Judge shall think reasonable ; and in case such variance shall be in some particular or particulars in the judgment of such Court or Judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such Court or Judge shall have power to cause the same to be amended, upon payment of costs to the other party and withdrawing the record or postponing the trial as aforesaid, as such Court or Judge shall think reasonable ; and after any such amendment the trial shall proceed, in

case the same shall be proceeded with, in the same *manner in all respects, both with respect to the liability of witnesses to be indicted [*441] for perjury, and otherwise, as if no such variance had appeared; and in case such trial shall be had at nisi prius or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea, or the writ, as the case may be, and returned together with the record or writ, and thereupon such papers, rolls, and other records of the Court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any Court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had; provided that it shall be lawful for any party who is dissatisfied with the decision of such Judge at nisi prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the Court from which such record or writ issued for a new trial upon that ground, and in case any such Court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the Court shall think fit, or the Court shall make such other order as to them may seem meet.

XXIV. And be it further enacted, That the said Court or Judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said Court, or the Court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case.

XXVI. And in order to render the rejection of witnesses on the ground of interest less frequent, be it further enacted, That if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action, on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined, but, in that case, a verdict or judgment in that action in favor of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him or any one claiming under him.

XXVII. And be it further enacted, That the name of every witness objected to as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some

officer of the Court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent [*442] *proceeding in which the verdict or judgment shall be offered in evidence.

XXVIII. And be it further enacted, That upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.

XXIX. And be it further enacted, That the jury, on the trial of any issue or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass de bonis asportatis, and over and above the money recoverable in all actions on policies of assurance made after the passing of this act.

XXX. And be it further enacted, That if any person shall sue out any writ of error, upon any judgment whatsoever, given in any Court in any action personal, and the Court of error shall give judgment for the defendant thereon, then interest shall be allowed by the Court of error for such time as execution has been delayed by such writ of error, for the delaying thereof.

XXXI. And be it further enacted, That in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the Court in which such action is brought, or a Judge of any of the superior Courts shall otherwise order, be liable to pay costs to the defendant, in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable, if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner.

*[3 & 4 Wm. 4, c. 83.]

[*443]

An Act to compel Banks issuing Promissory Notes payable to Bearer on Demand to make Returns of their Notes in Circulation, and to authorize Banks to issue Notes payable in London for less than Fifty Pounds.

[28th August, 1833.]

“Whereas it is expedient that all corporations, copartnerships, and persons carrying on banking business, and making and issuing promissory notes payable to bearer on demand, should make returns of the amount of such notes in circulation;” be it therefore enacted by the king’s most excellent Majesty, by and with the advice and consent of the lords, spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that all the corporations and copartnerships carrying on banking business, under the provisions of an act passed in the seventh year of the reign of his late Majesty King George the Fourth, intituled, “*An Act for the better regulating Copartnerships of certain Bankers in England, and for amending so much of an Act of the Thirty-ninth and Fortieth years of the Reign of his late Majesty King George the Third, intituled ‘An Act for establishing an Agreement with the Governor and Company of the Bank of England for advancing the sum of Three Millions towards the Supply for the Service of the Year One Thousand Eight Hundred,’ as relates to the same,*” and all other persons carrying on banking business, and making and issuing promissory notes payable to bearer on demand, shall respectively keep weekly accounts from the passing of this act of the average amount of notes in circulation at the end of each week of the corporation copartnership, or persons or person so carrying on banking business and keeping such weekly account, and shall, within one month after the thirty-first day of December after the passing of this act, make up from such weekly account an average account of the amount of such notes in circulation during the period between the passing of this act and the making up such account; and shall also make up a like account at the end of each quarter ending on the first day of April, the first day of July, the first day of October, and the first day of January in the year one thousand eight hundred and thirty-four, and every subsequent year, of the average amount of notes in circulation in the preceding quarter, and shall return and deliver such account to the commissioners of stamps at the Stamp Office in London; and such accounts and returns shall be verified upon the oath of the secretary or accountant, or some officer of the corporation, company or copartnership of persons or person so carrying on banking business and making such return, which oath shall be taken before any justice of the peace, and which oath any justice of the peace is hereby authorized to administer; and if any corporation, company, or copartnership, or persons or person carrying on banking business, shall neglect to keep such weekly accounts, or to make out or to return or deliver such averages to the commissioners of stamps at the Stamp Office in London,

or if any secretary, accountant, or other person verifying any such account or average, shall return or deliver to the commissioners of stamps any false [*444] *account or return of such averages, the corporation, company, or copartnership, or persons or person to whom any such account or averages, or such secretary, accountant, or person verifying the account, shall belong, shall forfeit for every such offence the sum of five hundred pounds, and the secretary or other person so offending shall also forfeit for every such offence the sum of one hundred pounds; and any secretary, accountant, or other person who shall knowingly and wilfully take any false oath as to any such account or averages, shall be subject to such pains and penalties as are by any law in force at the time of taking such oath enacted as to persons convicted of wilful and corrupt perjury.

II. And be it further enacted, That it shall be lawful for any body politic or corporate whatsoever, erected or to be erected, and for any other persons united or to be united in covenants or partnership, exceeding the number of six persons, carrying on business as bankers, to make any bill of exchange or promissory note of such corporation or copartnership payable in London by any agent of such corporation or copartnership in London, or to draw any bill of exchange or promissory note upon any such agent in London, payable on demand or otherwise in London, and for any less amount than fifty pounds; anything in the said recited act of the seventh year of the reign of his late Majesty King George the Fourth, or in any other act, to the contrary notwithstanding.

III. Be it further enacted, That this act may be amended, altered, or repealed by any act or acts to be passed in this present session of Parliament.

[3 & 4 Wm. 4, c. 97.]

An Act to prevent the selling and uttering of Forged Stamps and to exempt from Stamp Duty artificial Mineral Waters in Great Britain, and to allow a Drawback on the Exportation of Gold and Silver Plate manufactured in Ireland.
[29th of August, 1833.]

XVI. And be it enacted, That it shall be lawful for the commissioners of stamps from time to time, whenever they shall deem it necessary or expedient to discontinue the use of all or any of the dies heretofore provided or used, or at any time hereafter to be provided or used, for denoting or marking any stamp duty which now is, or at any time hereafter shall be by law payable for or in respect of any manner or thing whatsoever, and to cause any new die or dies, with such altered device or devices respectively thereon as the said commissioners shall think fit, to be provided and used in lieu of the die or dies so discontinued.

XVII. And be it enacted, That whenever the said commissioners shall de-

termine to discontinue the use of any die or dies, and shall provide any new die or dies to be used in lieu thereof, *and the said commissioners shall give public notice thereof by advertisement in the *London* [*445] and *Edinburgh Gazettes* respectively, then from and after such day or time as shall be fixed and appointed by such advertisement, not being within the space of one calendar month next after the same shall have been published in the said gazettes respectively, the said new die or dies so provided shall be the only true and lawful die or dies for denoting the duty charged or chargeable in any case to which such die or dies is or are respectively applicable; and all deeds and instruments for the marking or stamping of which any such new die or dies shall have been provided, and which after the day so fixed and appointed as aforesaid shall be ingrossed, written, or printed upon vellum, parchment, or paper stamped or marked with any other die or dies, than the said new die or dies so provided for the same as aforesaid, and also all such deeds and instruments as aforesaid which, having been ingrossed, written or printed upon vellum, parchment, or paper stamped or marked as last aforesaid, shall not have been executed, or signed by any party thereto, before or upon the said day so fixed and appointed as aforesaid, respectively be deemed to be ingrossed, written or printed on vellum, parchment, or paper not duly stamped or marked as required by law: provided always, that in the case of any deed or instrument required to be stamped or marked with such new die or dies, as aforesaid, which shall be ingrossed, written, or printed upon vellum, parchment, or paper, stamped or marked otherwise than with such new die or dies, and which after the said day or time so fixed and appointed as aforesaid shall be first executed or signed by any party thereto at any place out of the United Kingdom, it shall be lawful for the said commissioners, and they are hereby required, upon proof of the facts to their satisfaction, to cancel and allow the stamp or stamps impressed on such deed or instrument, and to cause such deed or instrument to be stamped or marked with such new die or dies, to the same amount of duty, without payment of any penalty, provided such deed or instrument shall be produced to the said commissioners for the purpose aforesaid within one calendar month next after the same shall arrive in this kingdom.

XVIII. Provided always, and be it enacted, That whenever the said commissioners shall discontinue the use of any die or dies, and shall provide any new die or dies to be used in lieu thereof, and shall give public notice thereof by advertisement in the manner directed by this act, it shall be lawful for all persons who shall have in their custody or possession any vellum, parchment, or paper stamped or marked with any die or dies in lieu of which any such new dies shall have been provided, and which vellum, parchment, or paper shall, by reason of the providing of such new die or dies be rendered useless or inapplicable for the purposes for which the same was originally designed, to send the same to the head office for stamps in Westminster or Edinburgh at any time within three calendar months next after the day so fixed and appointed by such advertisement as aforesaid; and it shall be

lawful for the said commissioners, or for any officer of stamp duties duly authorized in that behalf, to cause the stamp or stamps upon such vellum, parchment, or paper to be cancelled, and such vellum, *parchment, [*446] or paper, or (if the said commissioners or such officer shall think fit) any other vellum, parchment or paper to be duly stamped or marked with such new die or dies in lieu of and to an equal amount with the stamp or stamps so cancelled.

[3 & 4 Wm. 4, c. 98.]

An Act for giving to the Corporation of the Governor and Company of the Bank of England certain Privileges, for a limited Period, under certain Conditions.
[29th August, 1833.]

Whereas an act was passed in the thirty-ninth and fortieth years of the reign of his Majesty King George the Third, intituled “*An Act for establishing an Agreement with the Governor and Company of the Bank of England for advancing the sum of Three Millions towards the Supply for the service of the Year One Thousand Eight Hundred:*” and whereas it was by the said recited act declared and enacted, that the said governor and company should be and continue a corporation, with such powers, authorities, emoluments, profits, and advantages, and such privileges of exclusive banking, as are in the said recited act specified, subject nevertheless to the powers and conditions of redemption, and on the terms in the said act mentioned: and whereas an act passed in the seventh year of the reign of his late Majesty King George the Fourth, intituled, “*An Act for the better regulating Partnerships of certain Bankers in England, and for amending so much of an Act of the Thirty-ninth and Fortieth Years of the Reign of his late Majesty King George the Third, intituled, ‘An Act for establishing an agreement with the Governor and Company of the Bank of England for advancing the sum of Three Millions towards the Supply for the Service of the Year One Thousand Eight Hundred,’ as relates to the same:*” And whereas it is expedient that certain privileges of exclusive banking should be continued to the said governor and company for a further limited period, upon certain conditions: and whereas the said governor and company of the Bank of England are willing to deduct and allow to the public, from the sums now payable to the said governor and company for the charges of management of the public unredeemed debt, the annual sum hereinafter mentioned, and for the period in this act specified, provided the privilege of exclusive banking specified in this act is continued to the said governor and company for the period specified in this act: may it therefore please your Majesty that it may be enacted; and be it enacted by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That the said governor and company of the Bank of England shall

have and enjoy such exclusive privilege of banking as is given by this act as a body corporate, for the period and upon *the terms and conditions hereinafter mentioned and subject to termination of such exclusive [*447] privilege at the time and in the manner in this act specified.

II. And be it further enacted, That during the continuance of the said privilege, no body politic or corporate and no society or company, or persons united or to be united in covenants or partnerships, exceeding six persons, shall make or issue in London, or within sixty-five miles thereof, any bill of exchange or promissory note, or engagement for the payment of money on demand, or upon which any person holding the same may obtain payment on demand: Provided always, that nothing herein or in the said recited act of the seventh year of the reign of his late Majesty King George the Fourth, contained shall be construed to prevent any body politic or corporate, or any society or company, or incorporated company or corporation, or copartnership, carrying on and transacting banking business at any greater distance than sixty-five miles from London, and not having any house of business or establishment as bankers in London, within sixty-five miles thereof (except as hereinafter mentioned), to make and issue their bills and notes, payable on demand or otherwise, at the place at which the same shall be issued, being more than sixty-five miles from London, and also in London, and to have an agent or agents in London, or at any other place at which such bills or notes shall be made payable for the purpose of payment only, but no such bill or note shall be for any sum less than five pounds, or be reissued in London, or within sixty-five miles thereof.

III. "And whereas the intention of this act is, that the governor and company of the Bank of England should during the period stated in this act (subject nevertheless to such redemption as is described in this act), continue to hold and enjoy all the exclusive privileges of banking given by the said recited act of the thirty-ninth and fortieth years of the reign of his Majesty King George the Third aforesaid, as regulated by the said recited act of the seventh year of his late Majesty King George the Fourth, or any prior or subsequent act or acts of Parliament, but no other or further exclusive privilege of banking; and whereas doubts have arisen as to the construction of the said acts, and as to the extent of such exclusive privilege: and it is expedient that all such doubts should be removed;" be it therefore declared and enacted, That any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, may carry on the trade or business of banking in London or within sixty-five miles thereof, provided that such body politic or corporate, or society, or company, or partnership do not borrow, owe, or take up, in England, any sum or sums of money on their bills or notes payable on demand or at any less time than six months from the borrowing thereof, during the continuance of the privileges granted by this act to the said governor and company of the Bank of England.

IV. Provided always, and be it further enacted, That from and after the first day of August, one thousand eight hundred and *thirty-four, [*448] all promissory notes payable on demand of the governor and company of the Bank of England, which shall be issued at any place in that part of the United Kingdom called England out of London, where the trade and business of banking shall be carried on for and on behalf of the said governor and company of the Bank of England, shall be made payable at the place where such promissory notes shall be issued; it shall not be lawful for the said governor and company or any committee, agent, cashier, officer, or servant of the said governor and company, to issue, at any such place out of London, any promissory note payable on demand which shall not be made payable at the place where the same shall be issued, anything in the said recited act of the seventh year aforesaid to the contrary notwithstanding.

V. And be it further enacted, That upon one year's notice given within six months after the expiration of ten years from the first day of August, one thousand eight hundred and thirty-four, and upon repayment by Parliament to the said governor and company, or their successors, of all principal money, interest, or annuities, which may be due from the public to the said governor and company at the term of the expiration of such notice, in like manner as is hereinafter stipulated and provided, in the event of such notice being deferred until after the first day of August, one thousand eight hundred and fifty-five, the said exclusive privileges of banking granted by this act shall cease and determine at the expiration of such year's notice; and any vote or resolution of the House of Commons, signified by the Speaker of the said House in writing, and delivered at the public office of the said governor and company, or their successors, shall be deemed and adjudged to be a sufficient notice.

VI. And be it further enacted, That from and after the first day of August, one thousand eight hundred and thirty-four, unless and until Parliament shall otherwise direct, a tender of a note or notes of the governor and company of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender, to the amount expressed in such note or notes, and shall be taken to be valid as a tender to such amount for all sums above five pounds, on all occasions on which any tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin: Provided always, that no such note or notes shall be deemed legal tender of payment by the governor and company of the Bank of England, or any branch bank of the said governor and company; but the said governor and company are not to become liable or be required to pay and satisfy, at any branch bank of the said governor and company, any note or notes of the said governor and company not made specially payable at such branch bank; but the said governor and company shall be liable to pay and satisfy at the Bank of England in London all notes of the said governor and company of any branch thereof.

VII. And be it further enacted, That no bill of exchange or promissory note made payable at or within three months after the date thereof, or not having more than three months to run, shall, by *reason of any interest taken thereon or secured thereby, or any agreement to pay or [*449] receive or allow interest in discounting, negotiating, or transferring the same, be void, nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury, nor shall any person or persons, drawing, accepting, indorsing or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively, for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture; anything in any law or statute relating to usury in any part of the United Kingdom to the contrary notwithstanding.

VIII. And be it further enacted, That an account of the amount of bullion and securities in the Bank of England belonging to the said governor and company, and of notes in circulation, and of deposits in the said bank, shall be transmitted weekly to the Chancellor of the Exchequer for the time being, and such accounts shall be consolidated at the end of every month, and an average state of the bank accounts of the preceding three months, made from such consolidated accounts as aforesaid, shall be published every month in the next succeeding London Gazette.

IX. And be it further enacted, That one-fourth part of the debt of fourteen million six hundred and eighty-six thousand eight hundred pounds, now due from the public to the governor and company of the Bank of England, shall and may be repaid to the said governor and company.

X. And be it further enacted, That a general Court of Proprietors of the said governor and company of the Bank of England shall be held at some time between the passing of this act and the fifth day of October, one thousand eight hundred and thirty-four, to determine upon the propriety of dividing and appropriating the sum of three million six hundred and thirty-eight thousand two hundred and fifty pounds, out of or by means of the sum to be repaid to the said governor and company as hereinbefore mentioned, or out of or by means of the fund to be provided for that purpose, amongst the several persons, bodies politic or corporate, who may be proprietors of the capital stock of the said governor and company on the said fifth day of October, one thousand eight hundred and thirty-four, and upon the manner and the time for making such division and appropriation, not inconsistent with the provisions for that purpose herein contained; and in case such general Court, or any adjourned general Court, shall determine that it will be proper to make such division, then, but not otherwise, the capital stock of the said governor and company shall be and the same is hereby declared to be reduced from the sum of fourteen million five hundred and fifty-three thousand

pounds, of which the same now consists, to the sum of ten million nine hundred and fourteen thousand seven hundred and fifty pounds, making a reduction or difference of three million six hundred and thirty-eight thousand two [*450] hundred and fifty pounds capital stock, *and such reduction shall take place from and after the said fifth day of October, one thousand eight hundred and thirty-four; and thereupon, out of or by means of the sum to be repaid to the said governor and company as hereinbefore mentioned, or out of or by means of the fund to be provided for that purpose, the sum of three million six hundred and thirty-eight thousand two hundred and fifty pounds sterling, or such proportion of the said fund as shall represent the same, shall be appropriated and divided amongst the several persons, bodies politic or corporate, who may be proprietors of the said sum of fourteen million five hundred and fifty-three thousand pounds bank stock on the said fifth day of October, one thousand eight hundred and thirty-four, at the rate of twenty-five pounds sterling for every one hundred pounds of bank stock which such persons, bodies politic and corporate, may then be proprietors of or shall have standing in their respective names in the books kept by the said governor and company for the entry and transfer of such stock, and so in proportion for a greater or lesser sum.

XI. Provided always, and be it enacted, That the reduction of the share of each proprietor of and in the capital stock of the said governor and company of the Bank of England, by the repayment of such one-fourth part thereof, shall not disqualify the present governor, deputy governor, or directors, or any or either of them, or any governor, deputy governor, or director who may be chosen in the room of the present governor, deputy governor, or directors at any time before the general Court of the said governor and company to be held between the twenty-fifth day of March and the twenty-fifth day of April, one thousand eight hundred and thirty-five: Provided that at the said general Court, and from and after the same, no governor, deputy governor, or director of the said corporation shall be capable of being chosen such governor, deputy governor, or director, or shall continue in his or their respective offices, unless he or they respectively shall at the time of such choice have, and during such his respective office continue to have, in his and their respective name, in his and their own right, and for his and their own use, the respective sums or shares of and in the capital stock of the said corporation in and by the charter of the said governor and company prescribed as the qualification of governor, deputy governor, and directors respectively.

XII. Provided also, and be it enacted, That no proprietor shall be disqualified from attending and voting at any general Court of the said governor and company, to be held between the said fifth day of October, one thousand eight hundred and thirty-four, and the twenty-fifth day of April, one thousand eight hundred and thirty-five, in consequence of the share of such proprietor of and in the capital stock of the said governor and company having been reduced by such payment as aforesaid below the sum of five hundred

pounds of and in the said capital stock: Provided such proprietor had in his own name the full sum of five hundred pounds of and in the said capital stock on the said fifth day of October, one thousand eight hundred and thirty-four; nor shall any proprietor be required, between the fifth day of October, *one thousand eight hundred and thirty-four, and [*451] the twenty-fifth day of April, one thousand eight hundred and thirty-five, to take the oath of qualification in the said charter.

XIII. And be it further enacted, That from and after the said first day of August, one thousand eight hundred and thirty-four, the said governor and company, in consideration of the privileges of exclusive banking given by this act, shall, during the continuance of such privileges, but no longer, deduct from the sums now payable to the said governor and company, for the charges of management of the public unredeemed debt, the annual sum of one hundred and twenty thousand pounds, anything in any act or acts of Parliament or agreement to the contrary notwithstanding: Provided always, that such deduction shall in no respect prejudice or affect the right of the said governor and company to be paid for the management of the public debt at the rate and according to the terms provided in an act passed in the forty-eighth year of his late Majesty King George the Third, intituled, "*An Act to authorize the Advancing for the Public Service, upon certain conditions, a proportion of the balance remaining in the Bank of England for payment of unclaimed dividends, annuities, and lottery prizes, and for Regulating the Allowances to be made for the Management of the National Debt.*"

XIV. And be it further enacted, That all the powers, authorities, franchises, privileges, and advantages given or recognized by the said recited act, of the thirty-ninth and fortieth years aforesaid, as belonging to or enjoyed by the governor and company of the Bank of England, or by any subsequent act or acts of Parliament, shall be and the same are hereby declared to be in full force and continued by this act, except so far as the same are altered by this act, subject nevertheless to such redemption upon the terms and conditions following: (that is to say,) that at any time upon twelve months' notice to be given after the first day of August, one thousand eight hundred and fifty-five, and upon repayment by Parliament to the said governor and company or their successors of the sum of eleven million fifteen thousand one hundred pounds, being the debt which will remain due from the public to the said governor and company after the payment of the one-fourth of the debt of fourteen million six hundred and eighty-six thousand eight hundred pounds as hereinbefore provided, without any deduction, discount, or abatement whatsoever, and upon payment to the said governor and company and their successors of all arrears of the sum of one hundred thousand pounds per annum in the said act of the thirty-ninth and fortieth years aforesaid mentioned, together with the interest or annuities payable upon the said debt or in respect thereof, and also upon repayment of all the principal and

interest which shall be owing unto the said governor and company and their successors upon all such tallies, exchequer orders, exchequer bills, or parliamentary funds which the said governor and company or their successors shall have remaining in their hands or be entitled to at the time of such notice to be given as last aforesaid, then and in such case, and not until then (unless [*452] under the proviso hereinbefore contained), the said exclusive *privileges of banking granted by this act shall cease and determine at the expiration of such notice of twelve months.

XV. And be it further enacted, that this act may be altered, amended, or repealed, by any act to be passed in this session of Parliament.

[5 & 6 Wm. 4, c. 41.]

An Act to amend the Law relating to Securities given for Considerations arising out of Gaming, usurious, and certain other illegal Transactions.

[31st August, 1835.]

“Whereas by an act passed in the sixteenth year of the reign of his late Majesty King Charles the Second, and by an act passed in the Parliament of Ireland in the tenth year of the reign of his late Majesty King William the Third, each of such acts being intituled ‘*An Act against deceitful, disorderly, and excessive Gaming*,’ it was enacted, that all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and securities whatsoever, which should be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for any money or other thing lost at play or otherwise as in the said acts respectively is mentioned, or for any part thereof, should be utterly void and of none effect: And whereas by an act passed in the ninth year of the reign of her late Majesty Queen Anne, and also by an act passed in the Parliament of Ireland in the eleventh year of the reign of her said late Majesty, each of such acts being intituled ‘*An Act for the better preventing of excessive and deceitful Gaming*,’ it was enacted, that from and after the several days therein respectively mentioned all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities should be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as did game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that should, during such play, so play or bet, should be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever; and that where such mort-

gages, securities, or other conveyances, should be of lands, tenements, or hereditaments, or should be such as should incumber or affect the same, such mortgages, securities, or other conveyances should enure and be to and for the sole use and benefit of and should devolve upon such person or persons as *should or might have or be entitled to such lands or hereditaments [*453] in case the said grantor or grantors thereof, or the person or persons so incumbering the same, had been naturally dead, and as if such mortgages, securities, or other conveyances had been made to such person or persons so to be entitled after the decease of the person or persons so incumbering the same; and that all grants or conveyances to be made for the preventing of such lands, tenements or hereditaments from coming to or devolving upon such person or persons thereby intended to enjoy the same as aforesaid, should be deemed fraudulent and void, and of none effect, to all intents and purposes whatsoever: And whereas by an act passed in the twelfth year of the reign of her said late Majesty Queen Anne, intituled, '*An Act to reduce the rate of Interest without any Prejudice to Parliamentary Securities,*' it was enacted, that all bonds, contracts, and assurances whatsoever made after the twenty-ninth day of September one thousand seven hundred and fourteen, for payment of any principal or money to be lent or covenanted to be performed upon or for any usury, whereupon or whereby there should be reserved or taken above the rate of five pounds in the hundred, as therein mentioned, should be utterly void: And whereas by an act passed in the Parliament of Ireland in the fifth year of the reign of his late Majesty King George the Second, intituled '*An Act for reducing the Interest of Money to Six per Cent.,*' it was enacted, that all bonds, contracts and assurances whatsoever made after the first day of May one thousand seven hundred and thirty-two, for payment of any principal or money to be lent or covenant to be performed upon or for any loan, whereupon or whereby there should be taken or reserved above the rate of six pounds in the hundred, should be utterly void: And whereas by an act passed in the fifty-eighth year of the reign of his late Majesty King George the Third, intituled '*An Act to afford Relief to the bona fide Holders of Negotiable Securities without Notice that they were given for a usurious Consideration,*' it was enacted, that no bill of exchange or promissory note that should be drawn or made after the passing of that act should, though it might have been given for a usurious consideration or upon a usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had at the time of discounting or paying such consideration for the same actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration or upon a usurious contract: And whereas by an act passed in the Parliament of Ireland in the eleventh and twelfth year of the reign of his late Majesty King George the Third, intituled '*An Act to prevent Frauds committed by Bankrupts,*' it was enacted that every bond, bill, note, contract, agreement, or other security whatsoever to be made or given by any bankrupt or by any other person unto or to the use of or in trust for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bankrupt at the time of his becoming bankrupt, or any part thereof,

between the time of his becoming bankrupt and such bankrupt's discharge, as a consideration or to the intent to persuade him, her, or them to consent to or sign any such allowance or certificate, should be wholly void and of no effect, and the moneys there secured or *agreed to be paid should not [*454] be recovered or recoverable: And whereas by an act passed in the forty-fifth year of the reign of his said late Majesty King George the Third, intituled, '*An Act for the Encouragement of Seamen, and for the better and more effectually manning his Majesty's Navy during the present War,*' it was enacted, that all contracts and agreements which should be entered into, and all bills, notes, and other securities which should be given, by any person or persons for ransom of any ship or vessel, or of any merchandise or goods on board the same, contrary to that act, should be absolutely null and void in law, and of no effect whatsoever: And whereas by an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled '*An Act to amend the Laws relating to Bankrupts,*' it was enacted, that any contract or security made or given by any bankrupt, or other person, unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt, at his bankruptcy, as a consideration or with intent to persuade such creditor to consent to or sign the certificate of any such bankrupt, should be void, and the money thereby secured or agreed to be paid should not be recoverable, and the party sued on such contract or security might plead the general issue, and give that act and the special matter in evidence: And whereas securities and instruments made void by virtue of the several hereinbefore recited acts of the sixteenth year of the reign of his said late Majesty King Charles the Second, the tenth year of the reign of his said late Majesty King William the Third, the ninth and eleventh years of the reign of her said late Majesty Queen Anne, the eleventh and twelfth years of the reign of his late Majesty King George the Third, the forty-fifth year of the reign of his said late Majesty King George the Third, and the sixth year of the reign of his said late Majesty King George the Fourth, and securities and instruments made void by virtue of the said act of the twelfth year of the reign of her said late Majesty Queen Anne, and the fifth year of the reign of his said late Majesty King George the Second, other than bills of exchange or promissory notes made valid by the said act of the fifty-eighth year of the reign of his late Majesty King George the Third, are sometimes indorsed, transferred, assigned, conveyed to purchasers or other persons for a valuable consideration without notice of the original consideration for which such securities or instruments were given; and the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice:" For remedy thereof be it enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That so much of the hereinbefore recited acts of the sixteenth year of the reign of his said late Majesty King Charles the Second, the tenth year of the reign of his said late Majesty King William the Third, the ninth, eleventh, and twelfth years of the reign of her

said late Majesty Queen Anne, the fifth year of the reign of his said late Majesty King George the Second, the eleventh and twelfth and the forty-fifth years of the reign of his said late Majesty King George the Third, and the sixth year of the reign of his said late Majesty King George the Fourth, as *enacts that any note, bill, or mortgage shall be absolutely [*455] void, shall be and the same is hereby repealed ; but nevertheless every note, bill, or mortgage which if this act had not been passed would, by virtue of the said several lastly hereinbefore mentioned acts or any of them, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration, and the said several acts shall have the same force and effect which they would respectively have had if instead of enacting that any such note, bill, or mortgage should be absolutely void, such acts had respectively provided that every such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration : Provided always, that nothing herein contained shall prejudice or affect any note, bill, or mortgage which would have been good and valid if this act had not been passed.

II. And be it further enacted, That in case any person shall after the passing of this act, make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the hereinbefore recited acts of the sixteenth year of the reign of his said late Majesty King Charles the Second, the tenth year of the reign of his said late Majesty King William the Third, and the ninth and eleventh years of the reign of her said late Majesty, Queen Anne, or by any one or more of such acts, declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of his Majesty's Courts of record.

III. And be it further enacted, That so much of the said acts of the ninth and eleventh years of the reign of her said late Majesty Queen Anne as enacts that where such mortgages, securities, or other conveyances as therein mentioned should be of lands, tenements, or hereditaments, or should be such as should incumber or affect the same, such mortgages, securities, or other conveyances should enure and be to and for the sole use and benefit of and should devolve upon such person or persons as should or might have or be entitled to such lands or hereditaments in case the grantor or grantors thereof, or the person or persons incumbering the same, had been naturally dead, as if such mortgages, securities, or other conveyances had been made

to such person or persons so to be entitled after the decease of the person or persons so incumbering the same, and that all grants or conveyances to be made for the preventing of such lands, tenements, or hereditaments, from coming to or devolving upon such person or persons thereby intended to enjoy the same as aforesaid, should be deemed fraudulent and void, and of none effect to all intents and purposes whatsoever, shall be and the same is hereby [*456] repealed; saving to *all persons all rights acquired by virtue thereof previously to the passing of this act.

IV. And be it further enacted, That this act may be altered or repealed by any other act during this present session of Parliament.

[6 & 7 Wm. 4, c. 58.]

An Act for declaring the Law as to the Day on which it is requisite to present for Payment to the Acceptors or Acceptor supra protest for Honor, or to the Referees or Referee in case of Need, Bills of Exchange which had been dishonored.

[13th August, 1836.]

“Whereas bills of exchange are occasionally accepted supra protest for honor or have a reference thereon in case of need: And whereas doubts have arisen when bills have been protested for want of payment as to the day on which it is requisite that they should be presented for payment to the acceptor or acceptors for honor, or to the referees or referee, and it is expedient that such doubts should be removed:” be it therefore declared and enacted by the King’s most excellent Majesty, by and with the consent and advice of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That it shall not be necessary to present such bills of exchange to such acceptors or acceptor for honor, or to such referees or referee, until the day following the day on which such bills of exchange shall become due; and that if the place of address on such bill of exchange of such acceptors or acceptor for honor, or of such referees or referee, shall be in any city, town, or place other than in the city, town, or place where such bill shall be therein made payable, then it shall not be necessary to forward such bill of exchange for presentment for payment to such acceptors or acceptor for honor, or referees or referee, until the day following the day on which such bill of exchange shall become due.

II. And be it further enacted and declared, That if the day following the day on which such bill of exchange shall become due shall happen to be a Sunday, Good Friday, or Christmas Day, or a day appointed by his Majesty’s proclamation for solemn fast or of thanksgiving, then it shall not be necessary that such bill of exchange shall be presented for payment, or be forwarded for such presentment for payment, to such acceptors or acceptor for honor,

or referees or referee, until the day following such Sunday, Good Friday, Christmas Day, or solemn fast or day of thanksgiving.

*[7 Wm. 4, and 1 Vict. c. 80.]

[*457]

An Act to exempt certain Bills of Exchange and Promissory Notes from the Operation of the Laws relating to Usury. [17th July, 1837.]

“Whereas by an act passed in the fourth year of the reign of his Majesty King William the Fourth, intituled ‘*An Act for giving to the Corporation of the Governor and Company of the Bank of England certain Privileges for a limited Period under certain Conditions*,’ bills of exchange and promissory notes made payable at or within three months after the date thereof, or not having more than three months to run, and certain transactions in respect of such bills, were exempted from the operations of the statutes relating to Usury; and it is desirable to extend such exemptions:” be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this act, and till the first day of January, one thousand eight hundred and forty, no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, shall by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void, nor shall the liability of any party to any bill of exchange or promissory note be affected, by reason of any statute or law in force for the prevention of usury; nor shall any person or persons or body corporate drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan of money, on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture; anything in any law or statute relating to usury, or any other law whatsoever in force in any part of the United Kingdom, to the contrary notwithstanding.

[1 & 2 Vict. c. 10.]

An Act to make good certain Contracts which have been or may be entered into by certain Banking and other Copartnerships.
[20th February, 1838.]

“Whereas divers associations and copartnerships, consisting of more than six members or shareholders, have from time to time been formed for the

purpose of being engaged in and carrying on the business of banking and divers other trades and dealings for *gain and profit, and have accordingly for some time past been and now are engaged in carrying on the same by means of boards of directors or managers, committees or other officers, acting on behalf of all the members or shareholders of or persons otherwise interested in such associations or copartnerships: And whereas divers spiritual persons, having or holding dignities, prebends, canonries, benefices, stipendiary curacies, or lectureships, have been and are members or shareholders of, or otherwise interested in divers of such associations and copartnerships, and it has not been commonly known or understood that the holding of such shares or interests by such spiritual persons was contrary to law: And whereas it is expedient to render legal and valid all contracts entered into by such associations or copartnerships, or which for a limited time may be entered into by them, although the same may now be void by reason of such spiritual persons being or having been such member or shareholders or otherwise interested as aforesaid:’ be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That no such association or copartnership already formed or which may be formed at any time before the end of the next session of Parliament, nor any contract either as between the members, partners, or shareholders composing such association or copartnership for the purpose thereof, or as between such association or copartnership and other persons, heretofore entered into, or which before the end of the next session of Parliament shall be entered into, by any such association or copartnership already formed or hereafter to be formed, shall be deemed or taken to be illegal or void, or to occasion any forfeiture whatsoever, by reason only of any such spiritual person as aforesaid being or having been a member, partner, shareholder, manager, or director of or otherwise interested in the same, but all such associations and copartnerships shall have the same validity, and all such contracts shall and may be enforced in the same manner to all intents and purposes as if no such spiritual person had been or was a member, partner, shareholder, manager, or director of or interested in such association or copartnership.

II. And be it further enacted, That in all actions and suits which shall have been brought or instituted by or on behalf of any such association or copartnership, in case any defendant therein shall, before the sixth day of February, one thousand eight hundred and thirty-eight, by plea or otherwise, have insisted on the invalidity of any contract thereby sought to be enforced, by reason of any such spiritual person as aforesaid being or having been a member or shareholder in such association or copartnership, such defendant shall be entitled to the full costs of such plea or defence, to be paid by the plaintiff, and to be taxed as the Court in which the said action or suit shall be depending, or any Judge thereof, shall direct; and in order fully to indemnify such defendant, it shall be lawful for such Court or Judge to order

the plaintiff to pay to him such further costs (if any) of the said action or suit as the justice of the case may require.

*III. And be it further enacted, That this act may be repealed or altered by any other act in this present session of Parliament. [*459]

[1 & 2 Vict. c. 85.]

An Act to authorize the using in any part of the United Kingdom, Stamps denoting Duties payable in Great Britain and Ireland respectively.

[10th August, 1838.]

“Whereas under and by virtue of the laws in force separate and distinct stamps are used for denoting the stamp duties payable in Great Britain and Ireland respectively, and it is expedient to permit stamps denoting the duties payable on deeds or instruments in either of the said parts of the United Kingdom of Great Britain and Ireland, to be used for deeds or instruments liable to stamp duties payable in the other part of the said United Kingdom :” Be it therefore enacted, by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this act any deed or instrument liable to any stamp duty payable in either part of the said United Kingdom, and for or upon which any stamp or stamps denoting a stamp duty or stamp duties payable in the other part of the United Kingdom shall have been at any time heretofore or shall be at any time hereafter used, of equal or greater amount with or than the duty or duties chargeable by law upon or in respect of such deed or instrument, shall nevertheless be deemed valid and effectual in the law : Provided always, that nothing herein contained shall extend to authorize the using of any stamp denoting any of the law, chancery, or exchequer fund duties in Ireland for any instrument other than such as is or shall be liable to the duty denoted by such stamp, nor to authorize the using for any instrument liable to any of the said last-mentioned duties any stamp other than such as is or may be provided and appropriated for denoting the duty to which such last-mentioned instrument is or may be liable, nor to authorize the using for any instrument any stamp specially appropriated to any other instrument by having its name on the face thereof.

*[1 & 2 Vict. c. 96.]

[*460]

An Act to amend, until the end of the next session of Parliament, the Law relative to Legal Proceedings by certain Joint Stock Banking Companies against their own Members, and by such Members against the Companies.

[14th August, 1838.]

“Whereas by an act passed in the seventh year of the reign of his late

Majesty King George the Fourth, intituled, '*An Act for the better regulating Copartnerships of certain Bankers in England, and for amending so much of an Act of the Thirty-ninth and Fortieth Years of the Reign of his late Majesty King George the Third, intituled, An Act for establishing an Agreement with the Governor and Company of the Bank of England, for advancing the Sum of Three Millions towards the Supply of the Service for the Year Eighteen Hundred, as relates to the same,*' it was amongst other things enacted, that it should be lawful for any bodies politic or corporate erected for the purposes of banking, or for any number of persons united in covenants or copartnerships, although such persons so united or carrying on business together should consist of more than six in number, to carry on (subject to certain provisions therein contained) the trade or business of bankers in England, in like manner as copartnerships of bankers consisting of not more than six persons in number might lawfully do; and it was further enacted, that all actions and suits against any persons who might be at any time indebted to any such copartnership carrying on business under the provisions of the said act, and all other proceedings at law and in equity to be instituted on behalf of any such copartnership against any persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, might be commenced and prosecuted in the name of any one of the public officers for the time being of such copartnership, to be nominated as therein is mentioned, as the nominal party on behalf of such copartnership, and that actions or suits, and proceedings at law or in equity, to be instituted by any persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, against such copartnership, should be commenced and prosecuted against any one or more of the public officers for the time being of such copartnership as the nominal defendant on behalf of such copartnership, and that the death, resignation, removal, or any act of such public officer should not abate or prejudice any such action, suit, or other proceeding commenced against or on behalf of such copartnership, but that the same might be continued in the name of any other of the public officers of such copartnership for the time being: and whereas an act was passed in the sixth year of the reign of his said late Majesty, intituled, '*An Act for the better regulation of Copartnerships of certain Bankers in Ireland:*' and whereas it is expedient that the said acts should for a limited time be amended so far as relates to the powers enabling

[*461] any such copartnership, not being a body corporate, to sue any of its own *members, and the powers enabling any member of any such copartnership, not being a body corporate, to sue the said copartnership:" Be it therefore enacted, by the queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That any person now being or having been, or who may hereafter be or have been a member of any copartnership now carrying on or which may

hereafter carry on the business of banking under the provisions of the said recited acts, may, at any time during the continuance of this act, in respect of any demand which such person may have, either solely or jointly with any other person, against the said copartnership, or the funds or property thereof, commence and prosecute, either solely or jointly with any other person (as the case may require), any action, suit, or other proceeding at law or in equity against any public officer appointed or to be appointed under the provisions of the said acts, to sue and be sued on the behalf of the said copartnership; and that any such public officer may in his own name commence and prosecute any action, suit, or other proceeding at law or in equity against any person being or having been a member of the said copartnership, either alone or jointly with any other person, against whom any such copartnership has or may have any demand whatsoever; and that every person being or having been a member of any such copartnership shall, either solely or jointly with any other person (as the case may require), be capable of proceeding against any such copartnership by their public officer, and be liable to be proceeded against, by or for the benefit of the said copartnership, by such public officer as aforesaid, by such proceedings and with the same legal consequences as if such person had not been a member of the said copartnership; and that no action or suit shall in anywise be affected or defeated by reason of the plaintiffs or defendants, or any of them respectively, or any other person in whom any interest may be averred, or who may be in anywise interested or concerned in such action, being or having been a member of the said copartnership; and that all such actions, suits, and proceedings shall be conducted and have effect as if the same had been between strangers.

II. And be it enacted, That in case the merits of any demand by or against any such copartnership shall have been determined in any action or suit by or against any such public officer, the proceedings in such action or suit may be pleaded in bar of any other action or suit by or against the public officer of the same copartnership for the same demand

III. And be it enacted, That all the provisions of the said recited acts relative to actions, suits, and proceedings commenced or prosecuted under the authority thereof, shall be applicable to actions, suits, and proceedings commenced or prosecuted under the authority of this act.

IV. And be it enacted, That no claim or demand which any member of any such copartnership may have in respect of his share of the capital or joint stock thereof, or of any dividends, interest, *profits, or bonds payable or apportionable in respect of such share, shall be capable of [*462] being set off, either at law or in equity, against any demand which such copartnership may have against such member on account of any other matter or thing whatsoever; but all proceeds in respect of such other matter or thing may be carried on as if no claim or demand existed in respect of such

capital or joint stock, or of any dividends, interest, profits, or bonus payable or apportionable in respect thereof.

V. And be it enacted, That this act shall continue in force until the end of the next session of Parliament: and that any such action, suit, or other proceeding as aforesaid, which during the continuance of this act may have been commenced or instituted, shall (notwithstanding this act may have expired) be carried on in all respects whatsoever as if this act had continued in force.

VI. And be it enacted, That this act may be amended or repealed by any act to be passed in this present session of Parliament.

[1 & 2 Vict. c. 110.]

An Act for Abolishing Arrest on Mesne Process in Civil Actions, except¹ in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England.
[16th August, 1838.]

Whereas the present power of arrest upon mesne process is unnecessarily extensive and severe, and ought to be relaxed; be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That from and after the time appointed for the commencement of this act no person shall be arrested upon mesne process in any civil action in any inferior Court whatsoever, or (except in the cases and in the manner hereinafter provided for) in any superior Court.

II. And be it enacted, That all personal actions in her Majesty's superior Courts of law at Westminster shall be commenced by writ of summons.

III. And be it enacted, That if a plaintiff in any action in any of her Majesty's superior Courts of law at Westminster, in which the defendant is now liable to arrest, whether upon the order of a judge, or without such order, shall, by the affidavit of himself or of some other person, show to the satisfaction of a judge of one of the said superior Courts, that such plaintiff [*463] has a cause of action *against the defendant or defendants to the amount of twenty pounds or upwards, or has sustained damages to that amount, and that there is probable cause for believing that the defendant or any one or more of the defendants, is or are about to quit England, unless he or they be forthwith apprehended, it shall be lawful for such judge, by a special order, to direct that such defendant or defendants so about to quit England, shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it

shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of *capias* shall be in the form contained in the schedule to this act annexed, and it shall bear date on the day on which the same shall be issued: Provided always, that the said writ of *capias*, and all writs of execution to be issued out of the superior Courts of law at Westminster into the counties palatine of Lancaster and Durham, shall be directed to the Chancellor of the county palatine of Lancaster, or his deputy there, or to the Chancellor of the county palatine at Durham, or his deputy there.

IV. And be it enacted, That the sheriff or other officer to whom any such writ of *capias* shall be directed, shall, within one calendar month after the date thereof, including the day of such date, but not afterwards, proceed to arrest the defendant thereupon; and such defendant when so arrested shall remain in custody until he shall have given a bail bond to the sheriff, or shall have made deposit of the sum indorsed on such writ of *capias*, together with ten pounds for costs, according to the present practice of the said superior Courts; and all subsequent proceedings as to the putting in and perfecting special bail, or of making deposit and payment of money into Court, instead of putting in and perfecting special bail, shall be according to the like practice of the said superior Courts, or as near thereto as the circumstances of the case will admit.

V. And be it enacted, That any such special order may be made, and the defendant arrested in pursuance thereof at any time after the commencement of such action, and before final judgment shall have been obtained therein; and that a defendant in custody upon any such arrest, and not previously served with a copy of the writ of summons, may be lawfully served therewith.

VI. And be it enacted, That it shall be lawful for any person arrested upon any such writ of *capias* to apply at any time after such arrest, to a judge of one of the superior Courts at Westminster, or to the Court in which the action shall have been commenced, for an order or rule on the plaintiff in such action, to show cause why the person arrested should not be discharged out of custody; and that it shall be lawful for such Judge or Court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such Judge or Court shall seem fit: Provided that any such order made by a judge may be discharged or *varied by the Court, on application made thereto by either party dissatisfied with such order. [*464]

VII. And be it enacted, That every prisoner who at the time appointed for the commencement of this act shall be in custody upon the mesne pro-

cess for any debt or demand, and shall not have filed a petition to be discharged under the laws now in force for the relief of insolvent debtors, shall be entitled to his discharge upon entering a common appearance to the action : Provided nevertheless, that every such prisoner shall be liable to be detained, or after such discharge to be again arrested, by virtue of any such special order as aforesaid, at the suit of the plaintiff at whose suit he was previously arrested, or of any other plaintiff.

VIII. And be it enacted, That if any single creditor, or any two or more creditors being partners, whose debt shall amount to one hundred pounds or upwards, or any two creditors whose debts shall amount to one hundred and fifty pounds or upwards, or any three or more creditors, whose debts shall amount to two hundred pounds or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in her Majesty's Courts of Bankruptcy, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not within twenty-one days after personal service of such affidavit or affidavits and notice, pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond in such sum and with such sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the Court in which such action shall have been or may be brought according to the practice of such Court, or within such time and in such manner as the said Court or any Judge thereof shall direct after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after the service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise.

IX. And whereas it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment or a cognovit actionem due information of the nature and effect thereof; be it enacted, That from and after the time appointed for the commencement of this act no warrant of attorney to confess judgment in any personal action or cognovit actionem, given by any person, shall be of any force unless there shall be present some attorney of one of the superior Courts on behalf of [*465] such person, *expressly named by him and attending at his own request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his

name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney.

X. And be it enacted, That a warrant of attorney to confess judgment or cognovit actionem not executed in manner aforesaid shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same.

XI. And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law; be it therefore further enacted, That it shall be lawful for the sheriff or other officer to whom any writ of elegit or any precept in pursuance thereof, shall be directed, at the suit of any person, upon any judgment which at the time appointed for the commencement of this act shall have been recovered, or shall be thereafter recovered in any action in any of her Majesty's superior Courts at Westminster, to make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seized or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the Court out of which such execution shall have been sued out as a tenant by elegit is now subject to in a Court of equity: Provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable and is hereby required to make, perform, and render to the lord of the manor or other person entitled all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform, and render in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied: *Provided also, that as against purchasers, mortgagees, or creditors who shall have become such [*466]

before the time appointed for the commencement of this act, such writ of *elegit* shall have no greater or other effect than a writ of *elegit* would have had in case this act had not passed.

XII. And be it enacted, that by virtue of any writ of *fieri facias* to be sued out of any superior or inferior Court after the time appointed for the commencement of this act, or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes (whether of the governor and company of the Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects such writ of *fieri facias* shall be sued out; and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money as a security or securities for the amount of such writ of *fieri facias* directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived; and that the payment to such sheriff or other officer by the party liable on such cheque, bill of exchange, promissory note, bond, specialty, or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued: Provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty, or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to what he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action.

XIII. And be it enacted, That a judgment already entered up or to be hereafter entered up against any person in any of her Majesty's superior Courts at Westminster shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and

hereditaments of *copyhold or customary tenure) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, or reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment creditor shall have such and the same remedies in a Court of equity against the hereditaments so charged by virtue of this act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon: Provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, or in cases of judgments already entered up, or to be entered up before the time appointed for the commencement of this act, until after the expiration of one year from the time appointed for the commencement of this act, nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up unless such judgment shall have been entered up one year at least before the bankruptcy: Provided also, that as regards purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this act, such judgment shall not affect lands, tenements, or hereditaments, otherwise than as the same would have been affected by such judgment if this act had not passed: Provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of Courts of equity whereby protection is given to purchasers for valuable consideration without notice.

XIV. And be it enacted, That if any person against whom any judgment shall have been entered up in any of her Majesty's superior Courts at Westminster shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order

[*468] shall *entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favor by the judgment debtor: Provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order.

XV. And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving or disposing of any stock, funds, annuities or shares hereby authorized to be charged for the benefit of the judgment creditor under an order of a Judge, be it further enacted, That every order of a Judge charging any government stock, funds, or annuities, or any stock or shares in any public company under this act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds, or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the governor and company of the Bank of England from permitting a transfer of such stock in the meantime and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, that unless the judgment debtor shall within a time to be mentioned in such order show to a Judge of one of the said superior Courts sufficient cause to the contrary, the said order shall after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: Provided that any such Judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit. ♦

XVI. And be it enacted, That if any judgment creditor, who, under the powers of this act, shall have obtained any charge or be entitled to the benefit of any security whatsoever, shall afterwards and before the property so charged or secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judg-

ment, then and in such case such judgment creditor shall be *deemed and taken to have relinquished all right and title to the benefit of such charge and security, and shall forfeit the same accordingly. [*469]

XVII. And be it enacted, That every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment, or from the time of the commencement of this act in cases of judgments then entered up and not carrying interest, until the same shall be satisfied; and such interest may be levied under a writ of execution on such judgment.

XVIII. And be it enacted, That all decrees and orders of Courts of equity, and all rules of Courts of common law, and all orders of the Lord Chancellor or of the Court of review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior Courts of common law, and the person to whom any such moneys, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the Judges of the superior Courts of common law with respect to matters depending in the same Courts shall and may be exercised by Courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy, and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid.

XIX. Provided always, and be it further enacted, That no judgment of any of the said superior Courts, nor any decree or order in any Court of equity, nor any rule of a Court of common law, nor any order in bankruptcy or lunacy, shall by virtue of this act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court and the title of the cause or matter in which such judgment, decree, order, or rule, shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account of the debt, damages, costs, or moneys thereby recovered or ordered to be paid, shall be left with the senior Master of the Court of common pleas, at Westminster, who shall forthwith enter the same particulars in a book, in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order or rule; and such officer shall be entitled for any such entry to the sum of five shillings; and all persons shall be at liberty to search the same book, on payment of the sum of one shilling.

[*470] XX. And be it enacted, that such new or altered writs shall be sued out of the Courts of law, equity, and bankruptcy as may *by such Courts respectively be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the Judges of such Courts respectively shall from time to time think fit to order; and the execution of such writs shall be enforced in such and the same manner as the execution of writs of execution is now enforced, or as near thereto as the circumstances of the cases will admit; and that any existing writ, the form of which shall be in any manner altered in pursuance of this act, shall nevertheless be of the same force and virtue, as if no alteration had been made therein, except so far as the effect thereof may be varied by this act.

XXI. And be it enacted, that all the remedies, authorities, and provisions of this act applicable to her Majesty's superior courts of common law at Westminster, and the judgments and proceedings therein, shall extend to and be applicable to the Court of common pleas of the county palatine of Lancaster, and the Court of pleas of the county palatine of Durham, within the limits of the jurisdiction of the same Courts respectively; and the judgments of each of the said last-mentioned Courts shall, within the limits of the jurisdiction of the same Courts respectively, have the same effect in all respects as the judgments of any of her Majesty's said superior Courts at Westminster, under and by virtue of this act; and all powers and authorities hereby given to the Judges, or any Judge of her Majesty's superior Courts at Westminster, with respect to matters depending in the same Courts, shall and may be exercised by the Judges, or any Judge of the said Court of common pleas at Lancaster, or the justices or any justice of the said Court of pleas at Durham, with respect to matters therein depending, and within the jurisdiction of the same Courts respectively: Provided always, that no judgment of either of the same last-mentioned Courts, shall by virtue of this act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and title, trade, or profession of the plaintiff and defendant, the date when such judgment was signed, and the amount of the debt, damages, and costs thereby recovered, shall be left with the prothonotary, or deputy prothonotary, or some other officer to be appointed for that purpose by the said Courts respectively, who shall forthwith enter the same particulars in a book, in alphabetical order, by the name of the person whose estate is to be affected thereby; and such officer shall be entitled for every such entry to the sum of two shillings and sixpence; and all persons shall be at liberty to search the same book, on payment of the sum of one shilling: and provided also, that no order or other proceeding under this act, made by any justice or justices of the said Court of common pleas of the county palatine of Lancaster, or the Court of pleas in the county palatine of Durham, shall be valid or effectual, except made in open Court on one of the Court or return days of the same Court, or except such justice or justices shall be also a

Judge or Judges of one of the said Courts at Westminster: Provided also, that no order directing any person or persons to be held to bail under this act, nor any order for discharging out of custody, any *person or persons arrested under this act, shall be made by any justice or justices of the Court of pleas in the county palatine of Durham, who shall not be a Judge or Judges of one of the said Courts of common law at Westminster. [*471]

XXII. And be it enacted, That in all cases where final judgment shall be obtained in any action or suit in any inferior Court of record, in which, at the time of passing of this act, a barrister of not less than seven years' standing shall act as Judge, assessor, or assistant in the trial of causes, and also in all cases where any rule or order shall be made by any such inferior Court of record as aforesaid whereby any sum of money or any costs, charges or expenses shall be payable to any person, it shall be lawful for the Judges of any of her Majesty's superior Courts of record at Westminster, or if such inferior Court be within the county palatine of Lancaster, for the Judges of the Court of Common Pleas at Lancaster, or for any Judge of any of the said Courts at chambers, either in term or vacation, upon the application of any person, who at the time of the commencement of this act shall have recovered, or who shall at any time thereafter recover such judgment, or to whom any money, or costs, charges, or expenses, shall be payable by such rule or order as aforesaid, or upon the application of any person on his behalf, and upon the production of the record of such judgment, or upon the production of such rule or order, such record, or rule or order, as the case may be, being respectively under the seal of the inferior Court and signature of the proper officer thereof, to order and direct the judgment, or, as the case may be, the rule or order, of such inferior Court to be removed into the said superior Court, or into the Court of Common Pleas at Lancaster, as the case may be, and immediately thereupon such judgment, rule, or order shall be of the same force, charge, and effect as a judgment recovered in, or a rule or order made by such superior Court, and all proceedings shall and may be immediately had and taken thereupon, or by reason or in consequence thereof, as if such judgment so recovered, or rule or order so made, had been originally recovered in or made by the said superior Court, or into the Court of Common Pleas at Lancaster, as the case may be; and all the reasonable costs and charges attendant upon such application and removal shall be recovered in like manner as if the same were part of such judgment or rule or order: Provided always, that no such judgment or rule or order when so removed as aforesaid shall affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, any further than the same would have done if the same had remained a judgment, rule or order of such inferior Court, and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same.

[*472]

*[2 & 3 Vict. c. 29.]

An Act for the better Protection of Parties dealing with Persons liable to the Bankrupt Laws. [19th July, 1839.]

Whereas by an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "*An Act to amend the Laws relating to Bankrupts*," it was among other things enacted, that all payments really and bona fide made by any bankrupt or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), should be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, and that all payments really and bona fide made to any bankrupt before the date and issuing of the commission against such bankrupt should be deemed valid, notwithstanding any prior act of bankruptcy committed, and that such creditor should not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the bankrupt had not at the time of such payment to such bankrupt notice of any bankruptcy committed: And whereas by an act passed in this present session of Parliament, intituled "*An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens, and Fiats in Bankruptcy*," it is among other things enacted, that all conveyances by any bankrupt bona fide made and executed before the date and issuing of the fiat against such bankrupt, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons to whom such bankrupt so conveyed had not at the time of such conveyance notice of any prior act of bankruptcy by him committed: And whereas it is expedient that further protection should be given to persons dealing with bankrupts, before the issuing of any fiat against them: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That all contracts, dealings and transactions by and with any bankrupt really and bona fide made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, bona fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded

on a *judgment on a warrant of attorney, or cognovit given by any bankrupt by way of such fraudulent preference [*473]

II. And be it further enacted, That this act may be repealed or altered by any other act in this present session of Parliament.

[2 & 3 Vict. c. 37.]

An Act to amend, and extend until the first day of January, One Thousand Eight Hundred and Forty-two, the Provisions of an Act of the first Year of her present Majesty, for exempting certain Bills of Exchange and Promissory Notes from the Operation of the Laws relating to Usury.

[29th July, 1839.]

Whereas by an act passed in the first year of the reign of her present Majesty, intituled "*An Act to exempt certain Bills of Exchange and Promissory Notes from the Operation of the Laws relating to Usury*," it was enacted, that bills of exchange payable at or within twelve months should not be liable, for a limited time, to the laws for the prevention of usury: and whereas the duration of the said act was limited to the first day of January, one thousand eight hundred and forty; and it is expedient that the provisions of the said act should be extended: Be it therefore enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this act no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money, above the sum of ten pounds sterling, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring any such bill of exchange or promissory note, be void, nor shall the liability of any part of any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected, by reason of any statute or law in force for the prevention of usury; nor shall any person or persons or body corporate drawing, accepting, indorsing or signing any such bill or note, or lending or advancing or forbearing any money as aforesaid, or taking more than the present rate of legal interest, in Great Britain and Ireland respectively, for the loan or forbearance of money as aforesaid, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture; anything in any law or statute relating to usury, or any other law whatsoever in force in any part of the United Kingdom, to the contrary notwithstanding: Provided always, that nothing herein contained shall extend to the loan or forbearance of any money *upon security of any lands, tenements, or hereditaments, or any estate or interest therein. [*474]

II. Provided always, and be it enacted, That nothing in this act contained shall be construed to enable any person or persons to claim, in any Court of law or equity, more than five per cent. interest on any account or on any contract or engagement, notwithstanding they may be relieved from the penalties against usury, unless it shall appear to the Courts that any different rates of interest was agreed to between the parties.

III. Provided always, and be it enacted, That nothing herein contained shall extend or be construed to extend to repeal or affect any statute relating to pawnbrokers, but that all laws touching and concerning pawnbrokers shall remain in full force and effect, to all intents and purposes whatsoever, as if this act had not been passed.

IV. And be it enacted, That this act shall continue in force until the first day of January, one thousand eight hundred and forty-two.

V. And be it enacted, That this act may be amended or repealed by any act to be passed in this session of Parliament.

[*Continued by the 3 & 4 Vict. c. 83; 4 & 5 Vict. c. 54; 6 & 7 Vict. c. 45; 8 & 9 Vict. c. 102, and by 13 & 14 Vict. c. 56, to the 1st January, 1856.*]

[6 & 7 Vict. c. 85.]

An Act for improving the Law of Evidence.

[22d August, 1843.]

“Whereas the inquiry after truth in Courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that all such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony:” now therefore be it enacted, by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any Court, or before any Judge, jury, sheriff, coroner, magistrate, [*475] officer, or person having by law or by consent *of parties, authority to hear, receive and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirma-

tion in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: provided that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively; provided, also, that this act shall not repeal any provision in a certain act passed in the session of Parliament holden in the seventh year of the reign of his late Majesty, and in the first year of the reign of her present Majesty, intituled, "*An Act for the Amendment of the Laws with respect to Wills*:" provided that in Courts of equity any defendant to any cause pending in any such Court may be examined as a witness on the behalf of the plaintiff, or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant so to be examined may have in the matters or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such a defendant as a witness.

II. And be it enacted, That wherever in any legal proceedings whatever legal proceedings may be set out, it shall be necessary to specify that any particular persons who acted as jurors have made affirmation instead of oath, but it may be stated that they served as jurymen, in the same manner as if no act had passed for enabling persons to serve as jurymen, without oath.

III. And be it enacted, That nothing in this act shall apply to or affect any suit, action, or proceeding brought or commenced before the passing of this act.

IV. And be it enacted, That nothing in this act shall extend to Scotland.

*[7 & 8 Vict. c. 32.]

[*476]

An Act to regulate the Issue of Bank Notes, and for giving to the Governor and Company of the Bank of England certain Privileges for a limited Period.
[19th July, 1844.]

IV. And be it enacted, That from and after the thirty-first day of August one thousand eight hundred and forty-four, all persons shall be entitled to demand from the Issue Department of the Bank of England Bank of England

notes in exchange for gold bullion, at the rate of three pounds seventeen shillings and nine pence per ounce of standard gold : Provided always, that the said governor and company shall in all cases be entitled to require such gold bullion to be melted and assayed by persons approved by the said governor and company at the expense of the parties tendering such gold bullion.

X. And be it enacted, That from and after the passing of this act no person other than a banker who on the sixth day of May, one thousand eight hundred and forty-four was lawfully issuing his own bank notes shall make or issue bank notes in any part of the United Kingdom.

XI. And be it enacted, That from and after the passing of this act it shall not be lawful for any banker to draw, accept, make, or issue, in England or Wales, any bill of exchange or promissory note or engagement for the payment of money payable to bearer on demand, or to borrow, owe, or take up, in England or Wales, any sums or sum of money on the bills or notes of such banker payable to bearer on demand, save and except that it shall be lawful for any banker who was on the sixth day of May, one thousand eight hundred and forty-four carrying on the business of a banker in England or Wales, and was then lawfully issuing, in England or Wales, his own bank notes, under the authority of a license to that effect, to continue to issue such notes to the extent and under the conditions hereinafter mentioned, but not further or otherwise ; and the right of any company or partnership to continue to issue such notes shall not be in any manner prejudiced or affected by any change which may hereafter take place in the personal composition of such company or partnership, either by the transfer of any shares or share therein, or by the admission of any new partner or member thereto, or by the retirement of any present partner or member therefrom : Provided always, that it shall not be lawful for any company or partnership now consisting of only six or less than six persons to issue bank notes at any time after the number of partners therein shall exceed six in the whole.

XII. And be it enacted, That if any banker in any part of the United Kingdom who after the passing of this act shall be entitled to issue bank notes shall become bankrupt, or shall cease to carry on the business of a banker, or shall discontinue the issue of bank notes, either by agreement [*477] with the governor and company of the *Bank of England or otherwise, it shall not be lawful for such banker at any time thereafter to issue any such notes.

XXVI. And be it enacted, That from and after the passing of this act it shall be lawful for any society or company or any persons in partnership, though exceeding six in number, carrying on the business of banking in London, or within sixty-five miles thereof, to draw, accept, or indorse bills of exchange, not being payable to bearer on demand, anything in the herein-

before recited act passed in the fourth year of the reign of his said Majesty King William the Fourth, or in any other act, to the contrary notwithstanding.

[12 & 13 Vict. c. 106.]

An Act to amend and consolidate the Laws relating to Bankrupts.

[1st August, 1849.]

LXXXIX. And with respect to the proceedings before adjudication of bankruptcy, be it enacted, That proceedings to obtain adjudication of bankruptcy shall be by petition (such petition, if presented by a creditor, being in the form specified in the schedule (M.) to this act annexed, and the truth thereof verified by the affidavit of the petitioner in the form specified in the schedule (N.) to this act annexed, and if presented by a trader, being in the form specified in the schedule (Q.) to this act annexed, and the truth thereof verified by the affidavit of such trader in the form specified in the schedule (N.) to this act annexed); and every such petition shall be filed of record and prosecuted as directed by this act; and from and after the filing of such petition the Court shall by virtue of this act, and without any commission, fiat, or special authority whatsoever, have full power and authority to take such order and direction with the body of the bankrupt as mentioned in this act, as also with all his lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customary hold as freehold, which he shall have in his own right before he became bankrupt, as also with all such interest in any such lands, tenements, and hereditaments as such bankrupt may lawfully depart withal, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandise, and debts, wheresoever they may be found or known, and to make or order sale thereof in manner herein mentioned, or otherwise order the same for satisfaction and payment of the creditors of the bankrupt.

XCI. That the amount of the debt of any creditor petitioning for adjudication of bankruptcy shall be as follows; that is to say, the single debt of such creditor, or of two or more persons being partners, so petitioning, shall amount to fifty pounds or upwards, and the debt of two creditors so petitioning shall amount to *seventy pounds or upwards, and the debt of three or more creditors so petitioning shall amount to one hundred pounds or upwards; and every person who has given credit to any trader upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may so petition or join in petitioning, whether he shall have had any security in writing for such sum or not. [*478]

XCIII. That any trader liable to become bankrupt may petition for adju-

dication of bankruptcy against himself; provided always, that unless such trader shall forthwith after the filing of his petition, and before adjudication of bankruptcy thereunder, make it appear to the satisfaction of the Court that his available estate is sufficient to pay his creditors at least five shillings in the pound, clear of all charges (to be estimated by the Court) of prosecuting the bankruptcy, such petition shall be dismissed, and no further petition shall be filed by such trader in the same district without the leave of the Court first obtained for that purpose, and the adjudication on any further petition shall be subject to the like condition as aforesaid as to the available estate of the trader.

CXXV. And with respect to the power of the Court over certain descriptions of property, be it enacted, That if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy: Provided that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage and assignment, duly registered according to the provisions of an act made in the Parliament holden in the eighth and ninth years of the reign of her Majesty, intituled "*An Act for the registering of British Vessels*," or any of the acts therein mentioned.

CXXVI. That if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration), have conveyed, assigned, or transferred to any of his children, or to any other person, any hereditaments, offices, fees, annuities, leases, goods or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or into any other person's name, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy; and every such sale shall be valid against the bankrupt, and such children and persons, and against all persons claiming under him.

CXXXIII. And with respect to transactions with the bankrupt, and [*479] executions against his property, up to the time of the bankruptcy, or within a limited time previously thereto, be it enacted, *That all payments really and bona fide made by any bankrupt, or by any person on his behalf, before date of the fiat or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt, and all payments really and bona fide made to any bankrupt before the date of the fiat or the filing of such petition, and all conveyances by any bankrupt bona fide made and executed before the date of the fiat or the filing of such petition, and all

contracts, dealings, and transactions by and with any bankrupt really and bona fide made and entered into before the date of the fiat or the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt bona fide executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt bona fide executed and levied by seizure and sale before the date of the fiat or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with or paying to or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such payment, conveyance, contract, dealing, or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed: Provided also, that nothing herein contained shall be deemed or taken to give validity to any payment or to any delivery or transfer of any goods or chattels made by any bankrupt, being a fraudulent preference of any creditor of such bankrupt, or to any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit actionem or Judge's order, obtained by consent given by any bankrupt by way of fraudulent preference.

CXXXIV. That no purchase from any bankrupt bona fide and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless a fiat or petition for adjudication of bankruptcy shall have been sued out or filed within twelve months after such act of bankruptcy.

CXXXV. That every warrant of attorney to confess judgment in any personal action, given by any bankrupt after the commencement of this act, and within two months of the filing of a petition for adjudication of bankruptcy by or against such bankrupt, and being for or in respect of (wholly or in part) an antecedent debt or money demand, and every cognovit actionem or consent to a Judge's order for judgment given by any bankrupt, at any time after the commencement of this act, and within two months of the filing of any such petition in any action commenced by collusion with the bankrupt, and not adversely, or purporting to have been given in an action, but having been in fact given before the commencement of any action against the bankrupt, such bankrupt being unable to meet his engagements at the time of giving such warrant of attorney, cognovit actionem, or consent (as [*480] the *case may be), shall be deemed and taken to be null and void, whether the same shall have been given by such bankrupt in contemplation of bankruptcy or not.

CLXXI. That where there has been mutual credit given by the bankrupt

and any other person, or where there are mutual debts between the bankrupt and any other person, the Court shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made provable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed.

CLXXIII. That any person who at the time of issuing the fiat or of filing a petition for adjudication of bankruptcy, shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt (although he may have paid the same after the issuing of the fiat or the filing of the petition for adjudication of bankruptcy), if the creditor shall have proved his debt under the bankruptcy, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the bankruptcy which such creditor possessed or would be entitled to in respect of such proof; or if the creditor shall not have proved, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the bankruptcy, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, bail, or liable as aforesaid, after an act of bankruptcy committed by the bankrupt, provided that such person had not, when he became surety or bail, or so liable as aforesaid, notice of an act of bankruptcy by such bankrupt committed.

CLXXVIII. That if any trader who shall become bankrupt after the commencement of this act shall have contracted, before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not provable under any other provision of this act, the person with whom such liability has been contracted shall be admitted to claim for such sum as the Court shall think fit; and after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before [481] the *filing of such petition, but not disturbing former dividends, provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed: Provided also, that where any such claim shall not have, either in the whole or in part, been

converted into a proof within six months after the filing of such petition, it may, upon the application of the assignees at any time after the expiration of such time, and if the Court shall think fit, be expunged either in whole or in part from the proceedings.

CC. That the certificate of conformity allowed under this act, subject to the provisions herein contained, shall discharge the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands made provable under the bankruptcy: Provided always, that no such certificate shall release or discharge any person who was a partner with such bankrupt at the time of his bankruptcy, or was then jointly bound or had made any joint contract with such bankrupt.

CCIV. That no bankrupt, after his certificate shall have been allowed, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement, made after the issuing of the fiat or filing of the petition for adjudication of bankruptcy, and if any bankrupt be sued upon any such contract, promise, or agreement, he may plead the general issue, and give this act and the special matter in evidence.

CCXXXIII. That if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication) within twenty-one days after the advertisement of the bankruptcy in the *London Gazette*, or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat, or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, or before the date and filing of the petition for adjudication, and that such fiat was sued forth, or such petition filed, on the day on which the same is stated in the *Gazette* to bear date.

CCXXXIV. That in any action, other than an action brought by the assignees for any debt or demand for which the bankrupt might have sustained an action had he not been adjudged bankrupt, and whether at the suit of or against the assignees, or against any person acting under the warrant of the Court, for anything *done under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt, or of the trading [*482] or act of bankruptcy respectively, unless the other party in such action shall,

if defendant at or before pleading, and if plaintiff before issue joined, give notice in writing to such assignees or other persons that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignees or other person shall prove the matter so disputed, or the other party admit the same, the Judge before whom the cause shall be tried may (if he think fit) grant a certificate of such proof or admission; and such assignees or other person shall be entitled to the costs occasioned by such notice; and such costs shall, if such assignees or other person shall obtain a verdict, be added to the costs, and if the other party shall obtain a verdict shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignees or other person.

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